OFFICE OF
THE AUDITOR GENERAL
CANADA

# AUDIT OFFICE GUIDE

COMPILED FOR INFORMATION
AND GUIDANCE IN THE
AUDIT OF ACCOUNTS

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# Foreword

This edition of the Audit Office Guide has been prepared with one aim in view: to save time in the performance of audits. The volume of accounts to be examined makes it desirable that audit officers have at hand a summary reference to the reasons for various usages and financial safeguards that Parliament expects to be respected in the administration of Consolidated Revenue Fund and public property. Auditors still too frequently find it necessary to spend hours in research because "it has always been done that way" may never be accepted as a satisfactory justification.

Members of the Audit Office are trained accountants, therefore it is not regarded as necessary to include in the Guide discussions of problems associated with the accounting audit. The Comptroller of the Treasury provides the Audit Office with a generous number of copies of the Treasury Manual. For that reason, no direct quotations from the Manual are included in the Guide and it is assumed that auditors may refer to the Manual, or other sources, when requiring the exact text of an administrative rule or regulation.

This edition includes a larger number of quotations from authoritative books, proceedings of parliamentary committees and court cases, with selection of the last influenced by the aptness of the words to illustrate a point rather than by the significance of the case to a lawyer, because the purpose of the Guide is to explain, not dictate, in the hope that study will promote consistency throughout the Office in evaluating transactions having parliamentary interest.

The Financial Administration Act, c. 116, R.S. 1952, is the basic legislation for the purposes of audit. Because it is frequently mentioned, the title is abbreviated throughout to "FA Act".

Watson Sellar

January 1958.

# The Audit Office

**1.** In 1878 Parliament created the position of Auditor General and on 1 August 1878 the first incumbent took office. In the early years of the Office, staff averaged sixteen and the total cost of the office (including the $3,200 salary of the Auditor General) was less than $20,000, with expenditures under audit amounting to $30 million. This edition of the Guide is issued eighty years later, the staff now numbering about 140, the cost of audit approximating $800,000 and Government expenditures around $5000 million; in addition, there are the transactions of over twenty Crown corporations to be annually audited by the Auditor General. These statistics illustrate why this Office Guide is designed to serve as a working tool.

**2.** Application of the principles of responsible government necessitates that Parliament control the public purse; consequently, it is ever of concern to the House of Commons that its fiscal decisions are, in the words of Chubb, "carried out accurately, faithfully and efficiently". The Audit Office exists to observe whether that is done.

**3.** The first Audit Act provided that: "No cheque for public money shall issue except upon the certificate of the Auditor General that there is parliamentary authority for the expenditure". This presented a question: Did it refer to the amount available in the vote or to the regularity of the proposed charge? The conclusion reached is set out in an opinion signed personally by the Minister of Justice, the material part being:

> Parliament never intended to make you the judge in the first instance of the validity of all the executive acts of the Crown. It must be remembered that the Government is responsible to Parliament and to the people for their acts. It is for them to satisfy Parliament and the people that they did not exceed their authority, or to justify any excess of authority on their part, and when necessary to ask Parliament to confirm their actions. Once it were admitted that the Government had to satisfy the Auditor General, or any other person outside of Parliament, as to the legal validity of any proposed action on their part before such action could be taken, it is not difficult to imagine that the consequences might be disastrous. (Printed in Audit Report for 1879)

This was accepted although it was used by the Auditor General to secure authority that he might charge to his vote the fees of lawyers he retained to advise on questions of law. That privilege has not been exercised for many years but was freely used during the long term of office of the first Auditor General.

**4.** Present legislation, of course, relieves the Auditor General of responsibility for cheque issues and he no longer may be required by Executive order to examine accounts before payment. Once the Office of the Comptroller of the Treasury became firmly established, that became redundant. The Auditor General has no statutory power to surcharge or disallow; his duty is to conduct



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a post audit and to report the outcome to the House of Commons which annually refers the Audit Report to the Public Accounts Committee for review and report. Practices of the Committee and the form of its reports are wholly within the Committee's discretion. For many years the Committee simply took evidence to be transmitted to the House and rarely associated any opinion on the merits of the matter, but since World War I the trend has been towards the practice of the British Public Accounts Committee of considering safeguards to avoid recurrence of anything regarded as undesirable. The influence of a Public Accounts Committee stems from the publicity it is able to give a matter as it has no authority to disallow, Parliament alone enjoying that power. (*Halsbury's Laws of England,* 2nd ed., vol. 28, p. 265)

**5. Audit Examinations.**—In later chapters the audit for authority will be discussed; here reference is to the accounting audit. Examinations are normally made by means of tests, the extent being determined by the nature of transactions and the state of accounts under review. In many respects examination of system is of more importance than the review of transactions. Bray points out that, where the accounting system is efficient, exhaustive reviews would be out of proportion to resulting benefit, so an auditor should start

> by acquiring a personal familiarity with the procedures and methods of the accounting system; he must know their functions and their limitations, he must assure himself that they are so designed as to control errors and irregularities and he must know that they are working as they were planned. If he is thoroughly satisfied on the adequacy and effectiveness of the system he can then resort to sampling tests, but he should never forget that the implications of such entries, as he does meticulously examine, must be carefully thought about before they are passed. He must especially see to it that the control elements of the system of accounting are such that undisclosed transactions are well-nigh impossible... (*The Interpretation of Accounts,* p. 195)

**6. Relationships with Departments.**—A successful audit requires the co-operation of administrative staffs; therefore, auditors should conduct themselves in a way that elicits good will and assistance, at the same time bearing in mind that, a public duty being performed, they must exercise due care and be prepared to let the chips fall where they may. Montgomery once observed that:

> The general rule of the common law, that all men are considered honest until proved dishonest, may be observed by an auditor... but he is charged with an exceptional degree of diligence in recognizing indications of dishonesty on the part of those who occupy responsible positions. (*Auditing Theory and Practice,* p. 630)

Fortunately, cases of dishonesty rarely present themselves in the administration of the affairs of the Government. The quotation is, however, useful to emphasize that care is to be taken to observe whether financial directions of Parliament are respected. An auditor would fail in the performance of his duty were he to permit himself to pass a transaction because of the plight of some officer or person.

**7.** An officer of the Audit Office cannot expect to receive administrative co-operation unless he regards the good name of a department as something he should strive to maintain, at the same time recognizing that the Canadian

people expect parliamentary directions to be observed. The repute of the Audit Office is not dependent on lengthy and critical reports to the House of Commons. It is in the public interest that, wherever possible, immediate corrective action be taken with respect to any irregular financial transaction in order to avoid the necessity of reporting it; therefore, when one is observed, departmental or Treasury attention should be drawn to it forthwith.

**8.** Information acquired in the course of audit is to be regarded as confidential and on no account divulged to anyone not entitled thereto. While it is human nature to be forgetful, an auditor should never forget that, in taking the oath of office, he solemnly declared: "I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment."

**9.** *Access to Information.*—In the course of a year, it may happen that an auditor experiences divergent departmental viewpoints with respect to the application to be given to section 66 (1) of the FA Act:

> **66.** (1) Notwithstanding any Act, the Auditor General is entitled to free access at all convenient times to all files, documents and other records relating to the accounts of every department, and he is also entitled to require and receive from members of the public service such information, reports and explanations as he may deem necessary for the proper performance of his duties.

The purpose of this enactment is to make certain that the Auditor General, an officer of Parliament, has opportunity to consider all relevant facts during the audit. The marking of a document or file as 'confidential' or 'secret' is no bar to audit scrutiny. But Parliament also recognizes that it is in the public interest that departments safeguard certain categories of information, so subsection (3) of section 66 stipulates that:

> (3) The Auditor General shall require every person employed in his office who is to examine the accounts of a department pursuant to this Act to comply with any security requirements applicable to, and to take any oath of secrecy required to be taken by persons employed in that department.

Auditors have a statutory right of access to files but only when the file is necessary for the performance of the audit. Section 66 is not to be utilized to satisfy personal curiosity. Again, "free access" is qualified by the words "at all convenient times". These indicate a right to inspect rather than to retain files indefinitely.

**10.** Situations sometimes arise where a department treats certain information as confidential but has no special security requirements. What is the obligation on an auditor? He should, as far as is practicable, adhere to practices applicable when an oath is taken. That is to say, plan the examination and notes in such a way that it is unnecessary to make copies or extracts from any documents that the department regards as subject to special security treatment. If he finds it necessary to copy any of the material, it should be kept on a confidential file.



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**11.** *The Right to Conduct an Inquiry.*—There has long existed a statutory power permitting the Auditor General to examine on oath. The wording has varied from time to time, the current text being section 74 of the FA Act:

> **74.** The Auditor General may examine any person on oath on any matter pertaining to any account subject to audit by him and for the purposes of any such examination the Auditor General may exercise all the powers of a commissioner under Part I of the Inquiries Act.

The Interpretation Act defines "person" as including any body corporate. The power given by the section is rarely used—never for the convenience of a department—as it is a special right to be used only in extraordinary circumstances where the audit obligation necessitates.

**12. Consolidated Revenue Fund.**—For the first time in a statute, this definition is to be found in the FA Act:

> "Consolidated Revenue Fund" means the aggregate of all public moneys that are on deposit at the credit of the Receiver General.

For constitutional reasons, a more embracing meaning has sometimes to be given because "Consolidated Revenue Fund" is a symbol used to encompass all public assets and liabilities capable of monetary evaluation. In law, the Crown is never possessed of money—its right is to draw on the Fund to the extent Parliament permits by legislation; so, when money is borrowed, it is the ever-growing produce of Consolidated Revenue Fund that is pledged. This constitutional rule is to make certain that the Crown is ever a suppliant to the House of Commons and explains why votes lapse on 31 March, why Crown property may be donated only with consent, no debt forgone, and why all moneys are deposited to the credit of the Receiver General as the custodian of Consolidated Revenue Fund on behalf of Parliament. In one sense Consolidated Revenue Fund is a money chest, in another it is the public assets and liabilities of Canada which are susceptible to monetary valuations.

**13.** Sometimes a statute provides for the establishment of "a special account in the Consolidated Revenue Fund" to which payments made for the purposes of the statute are required to be charged. "In the Consolidated Revenue Fund" in such a statutory provision means that moneys representing any balance that may accumulate to the credit of the special account form part of the ordinary cash balances in the hands of the Receiver General.

**14. Statutes and Regulations.**—An auditor has frequently to refer to the Acts of Parliament. In the concluding chapter some hints are given with respect to interpretation of statutes, so only a few general points need now be noted.

**15.** *Date When Statutes Take Effect.*—Section 7 of the Interpretation Act, c. 158, R.S., directs that the Clerk of the Parliaments (the Clerk of the Senate) endorse on every Act, immediately after the title thereof, the day, month and year when the Act was assented to in Her Majesty's name, and that:

> such endorsement shall be taken to be a part of the Act, and the date of such assent shall be the date of the commencement of the Act, if no other commencement is therein provided.

**16.** Sometimes a statute is to become operative on a future date. The postponement generally is to permit an administrative organization to be assembled. In that event, section 12 of the Interpretation Act is of audit interest. In part, it reads:

> Where an Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment . . . that power may . . . so far as may be necessary or expedient for the purpose of making the Act effective at the date of the commencement thereof, be exercised at any time after the passing of the Act . . .

**17.** *Repeal of a Statute.*—If a statute is repealed, that does not affect previous operation nor any right acquired or liability incurred. The authority is section 19 of the Interpretation Act, which also provides that when new legislation is substituted, unless the contrary intention appears, all officers appointed under the repealed statute continue to act as if appointed under the provisions of the new legislation.

**18.** *Rules and Regulations.*—Modern practice tends to declare principles in statutes and to delegate a power, generally to the Executive, to make regulations with respect to application. The statute may provide that regulations made under its authority 'shall' be published in the Canada Gazette. Generally, this is regarded as a directory provision where a failure to publish does not invalidate. However, section 6 of the Regulations Act, c. 235, R.S., provides that:

> no person shall be convicted for an offence consisting of a contravention of any regulation that was not published in the Canada Gazette

unless (*a*) a regulation under the Regulations Act removed the obligation to publish, or (*b*) by other means those likely to be affected by it had notice of the "purport of the regulation". A decision in England (R. *v. Sheer Metalcraft*) declares that when the appropriate authority makes and announces regulations, the printing and distributing of copies are matters of procedure which do not affect legality.

**19.** The Regulations Act gives the word 'regulation' an all-embracing meaning, but sometimes Acts of Parliament use the phrase 'rules and regulations' and an auditor may wonder what is the distinction; consequently, a quotation from Russell's *Legislative Drafting and Forms* follows:

> As regards the use of the words 'rules' or 'regulations', there has always been great variation in practice. . . . Considerable confusion is caused by the indiscriminate use of these terms, and it is desirable that a uniform practice should be adopted. It is suggested, therefore, that 'rules' should be used for subsidiary legislation dealing with procedure and 'regulations' for subsidiary legislation of a general nature. (p. 76)

In other words, directions with respect to procedure are 'rules' and substantive directions 'regulations'. The audit concern is not in the word used but in the authority to make and the directions thereby given.

**20. Audit Notes.**—The notes of auditors provide the material on which reports to the House of Commons are founded. The FA Act is precise with respect to some types of cases that must be noted in the Report but a problem always is the ambit of the direction to call attention to any other case that the

Auditor General "considers should be brought to the notice of the House of Commons". That opens a broad field, but well established practice throughout the Commonwealth is to concentrate on points of principle. The following quotation is lengthy and it was given in evidence over fifty years ago to a British Committee on National Expenditure, but what was then said by Comptroller and Auditor General Richmond has stood the test of time:

> I am a parliamentary officer whose duty it is not only to certify to the correctness of the accounts, as rendered, but, further, I am directed to report to Parliament. As regards reporting, I conceive I have something of a free hand. There are some points which I am obviously to report such as any excess over a grant of Parliament, any clear irregularity, and so forth; but I have also a duty to report on the accounts and availing myself of that opportunity I think it my duty to report anything which in my judgment, falling within my proper functions, it concerns the House of Commons to know. In the first instance, my object is to report in such a way as to assist the House of Commons in making its way through what may be a very bulky volume of accounts; but beyond that I do not feel myself debarred from calling attention to anything which has occurred in the course of my audit during the year which indicates loss or waste, or anything of that kind, which I think it is well that Parliament should know. Of course, in doing so, I have to act with great care and discretion. It is not for me to criticize administrative action as such; the departments are responsible for their own actions as regards general administration; but if I find the result of administrative action has been a loss or a wastefulness of public money, then I think it is not going beyond my duty of reporting, as an officer of the House of Commons, if I call specific attention to matters of that kind, even though the account itself would not disclose the facts.

The responsibility is on the Auditor General to decide what is to be drawn to the notice of Parliament, but he can efficiently discharge this obligation only when auditors report everything that they regard as of significance.

**21.** *The Time Period of a Note.*—The direction is to report on the accounts of a completed year, but sometimes it is expected that attention be drawn to later transactions. Therefore, audit notes should include up-to-date information, although relating to events after the accounting period, whenever that is necessary in order to outline fully a transaction of audit concern. It is also to be borne in mind that a special situation may occasionally justify reference to a transaction in the then current year. The Auditor General of South Africa was once asked by a member of the Public Accounts Committee why he did not wait until the year was ended to report a special case. His reply was:

> . . . the audit which my Department carries out is a continuous one, and it has always been the custom, when an important point of principle arises, to report it immediately. The object is to get the matter settled and to bring the point of principle to notice at the earliest opportunity.

The Committee accepted the matter as one properly before it.

**22.** *Drafting Notes and Reports.*—An audit is made to permit certificates to be given and, sometimes, reports to be made to departments or corporations with respect to accounts examined. It can happen that an audit is judged less by the skill employed than by the resulting observations. Absolute accuracy is imperative and, to attain, thoroughness must be practised in examinations, with audit notes founded exclusively on facts established. Should it be that an audit note is built around information provided verbally, that should be noted with suitable reference to the source.

**23.** When drafting, a few things to bear in mind are: (*a*) don't be hustled, (*b*) strive for simple presentation, (*c*) think over the points before and after writing, and (*d*) where practicable, in a lengthy note collect and summarize important findings and conclusions. Short words and sentences are steps towards a well written report. Except when communicating with an accountant or technical expert, the use of technical phrases and accounting jargon should be avoided.

**24.** Audit notes usually are critical commentaries, so auditors should note sources of information, dates, vouchers and other references, and amounts. Where practicable, copies or excerpts of letters or documents which are referred to or quoted should be attached, but only to the extent of practical usefulness. Files must be adequately documented to substantiate statements in reports but they should not be cluttered up with irrelevant or redundant material. Page reference to working papers should be noted opposite the relative comments in any report. It is Audit Office practice to transfer staff to the audit of other accounts from time to time. Therefore, it is advantageous to a person newly assigned to an audit to find in the file copies of statutes, regulations, rulings and official directions of concern to the accounts to be audited; also, a write-up of the accounting procedures, the methods employed in applying internal financial control and of the aims and objects of the audit.

## The Distribution of Administrative Powers

**25.** The Queen, as head of the State, administers all public affairs subject to the law, statutes and recognized usages. The constitutional rule is that:

> in order that an act of the Crown may be recognized as an expression of the Royal will and have any legal effect whatever, it must in general be done with the assent of or through some Minister or Ministers who will be held responsible for it. (Dicey's *Law of the Constitution*, p. 321)

Audit interest is generally in a person who makes or executes an administrative decision. His authority may be drawn from a statute or an Executive order, or by reason of his position in the hierarchy of officialdom. The point is that he must be able to prove his capacity to act, and there is a Manitoba decision to the effect that the capacity of a deputy head was not proved by his stating in a letter that he was writing under the instructions of the Minister. (*Canadian Dominion Engineering v. R.*)

**26. Parliament Does Not Administer.**—Auditors will bear in mind that the House of Commons is never to be regarded as assuming responsibility for any administrative act. Parliament may favour a certain course of action but the Executive is answerable for whatever is done. While much legislation in the statute books relates to administration, that is done solely to keep the machinery of the State in working order. Two illustrations are given. The first relates to a Bill under criticism in the British House of Commons where it was suggested that passage would be facilitated were it amended to provide that a certain appointment be subject to the approval of the House. This was rejected because it would circumscribe the freedom of the House subsequently to criticize either the appointment or the conduct of the officer.

**27.** The other example is drawn from the records of Ontario. In the 1890s a contract was negotiated which provided for the use of prison labour. This presented a question of public policy so it was agreed that the contract would be given effect only after the Legislative Assembly approved. This was done by means of a resolution. Disagreements resulted in litigation and before the Court it was contended that the resolution made the law applicable to the contract. With that the Court disagreed:

> I entirely disagree with the view that the assent by the House of Assembly to the contract, or the resolution of the House ratifying the contract made the contract or gave to the contract the force of a statute of the Province. ... It was simply an assent, not constitutionally necessary, I think—an assent by the Assembly to a contract which the Executive Government had entered into and had stipulated should not become operative until that assent had been obtained. (*Independent Cordage Company v. The King*)

**28. The Governor General.**—Being the personal representative of the sovereign, the Governor General's appointment and the determination of the tenure of office, etc., are by the Queen. The audit interest is in the Office because many things to be lawful must be done in the name of the Governor General.

**29.** *Deputies.*—These are personally selected by the Governor General (section 14 of B.N.A. Act). Invariably they are the Supreme Court judges, but that is not obligatory. However, in the event of the Governor General's death, incapacity or absence from Canada for more than thirty days, the Chief Justice of the Supreme Court automatically becomes Administrator of Canada for the time being after taking the required oaths. A proclamation lists the persons he names to act as his Deputies.

**30. The Governor in Council.**—The B.N.A. Act provides that there be a Privy Council "to aid and advise in the government of Canada". All Cabinet members are councillors and they alone are summoned to meetings of the Governor in Council, which is a committee of the Privy Council. Members of the Council take an oath, the text of which originated in 1257 and includes:

> You shall, in all things to be moved, treated and debated in Council faithfully and truly declare your mind and opinion according to your heart and conscience; and you shall keep secret all matters committed and revealed unto you or that shall be treated of secretly in Council.

This is why an auditor should never ask what were the considerations which influenced the taking of a decision. An auditor may, however, take notice of the ministerial 'report to Council' as it is a departmental paper.

**31.** *His Excellency Does Not Preside.*—No Governor General has made it a practice to attend business meetings of the Governor in Council. Up to 1858 the governors of the Province of Canada did, but the practice was then discontinued because it was

> most inexpedient as a general rule that the governor should be present during the discussion in council of particular measures. He is at liberty at all times to go into council and discuss any measures which he or the council think require it, but his presence as a regular and indispensable rule would check all freedom of debate and embarrass himself as well as his advisers. (Sir Edmund Head, March 1858)

**32.** *His Excellency Must Concur.*—A decision of the Council lacks legal significance until the Governor General signifies his approval. The group around the table may, as Ministers composing the Cabinet, make political decisions of great public significance, but only those made as Privy Councillors and sanctioned by the Governor General have effect in law. An auditor may not accept as proof a statement that 'the Minister took it to Council and it was decided that', etc.; where it is a statutory or constitutional requirement there must be an order in council. To illustrate, four types of cases that resulted in litigation are now given (two are provincial, but the law is the same).

**33.** *The Word of a Minister.*—In February 1899 the Minister of Militia and Defence (as the title then was) agreed to lease Crown land to a lumbering firm. A statute required that the lease be authorized by the Governor in Council and that was done. Shortly after, the firm sent its lawyer to negotiate amendments. The Minister brought the matter to the notice of the Cabinet where it was felt that the Department of Justice should be consulted. Shortly after, the Minister signed amendments to the lease which continued in operation until during World War I. For some reason or other the lease was then reviewed and it was decided the amendments were without effect because no order in council had authorized them. Litigation followed and the lawyer who acted in 1899 was a witness. He stated that the Minister had verbally assured him that the changes had been duly approved by Council and the Privy Council judgment notes he only was not sure

where it was that Sir Frederick Borden (then Minister) told him that the order in council had been made; it was immediately after the latter had attended the Council and it might have been at his office or it might have been at the Rideau Club at Ottawa.

On the other hand, the judgment observed that the Secretary of the Department had sworn that the files did not include a copy of any submission to Council to amend the lease; moreover, the Clerk of the Privy Council had stated in his evidence that there was no record in his office of such an order in council. It was held that it had not been proved that there was authority granted to amend the lease, therefore the amendments were without legal effect. (*The King v. Vancouver Lumber Co.*)

**34.** *An Admission by the Premier.*—A statute of British Columbia provided that, with the approval of the Lieutenant Governor in Council, the Minister of Public Works could acquire land for public works. The Province decided to construct a bridge and the Minister of Public Works negotiated for certain lots and, with the knowledge of the Cabinet, signed an agreement to purchase, price to be settled by arbitration. $107,400 was agreed as fair for the purposes of the agreement. Thereupon the solicitor for the owner wrote the Premier asking for a cheque. He replied that cheques were being sent to settle taxes, etc., but he had a problem so far as the principal amount was concerned: there was no vote, so a Governor's warrant would be necessary but unfortunately his Government had just been defeated and the Lieutenant Governor presumably would object to an application by him for a warrant. The new Government repudiated liability because no order in council had authorized the Minister of Public Works to purchase. Litigation followed and in one of the judgments is to be found:

> There was some suggestion in argument that the transaction had the approval of the Cabinet, but there was no suggestion that it had the assent of, or had ever been brought to the notice of the Lieutenant Governor so that it is not necessary here to consider whether a verbal Order in Council, something of which I have never heard, if proved, would have sustained the contract. In my opinion, the Legislature has clearly made it a condition to the acquisition of such lands as are in question that the decision of the Council should be signified in the customary way by minutes of council which should then be duly assented to by the Lieutenant Governor, and that in the absence of such, the province should not be put under obligation to the party with whom the Minister purported to contract. (*In re Mackay*)

**35.** *The Duration of an Authorization.*—In 1880 a fishing club leased lands from an Indian band. In order to remove a legal doubt, the band later surrended the lands to the Crown and an 1882 order in council authorized the Indian Affairs Department to execute a lease. This was done and in 1892, 1894, 1906, 1915 and 1925 the Department renewed (with some adjustments in terms) without seeking further orders in council. The 1925 agreement included a renewal clause to become operative at the end of twenty years. When that time came, the Department refused to renew. The question then was the position of the club. To prove that the 1925 lease was illegal, the Crown pointed to a section in the Indian Act requiring leases to be approved by the Governor in Council, while the club contended that the text of the 1882 order in council still provided authority to the Department. Both the Exchequer Court and the Supreme Court of Canada decided that each renewal was a new lease requiring the consent of the Governor in Council. (*St. Ann's Island Shooting & Fishing Club v. The King*)

**36.** *Rejection of a Statutory Application.*—British Columbia legislation provided that every petition of right be delivered to the Provincial Secretary "in order that the same may be submitted to the Lieutenant-Governor" for consideration and decision. A petition was received and the Minister took it to a Cabinet meeting. It was decided that grant of a fiat was not justified and the Provincial Secretary wrote to that effect. Action was taken against the Minister for $10,000 damages because he had failed to deliver the petition to the Lieutenant-Governor. When the matter reached the Supreme Court of Canada it was accepted that there would have been no cause for litigation had the petition been refused by order in council. That not having been done, Duff J. commented:

> It is perhaps not superfluous to mention that the Provincial Secretary's statutable obligation to submit the petition is something altogether different from the political obligation he owes to the Crown as its officer and one of its advisers, in respect of advice and otherwise, wherein he is not accountable at the suit of any individual.

His conclusion was that:

> While His Majesty's representative cannot under the constitution act without the advice of a responsible minister or ministers, and while the decision in all questions of administration must ultimately rest with those who will be responsible still the constitutional function of any particular minister or ministers of the Crown is to inform and advise and not to dictate. (*Norton v. Fulton;* sustained on appeal to the Privy Council)

**37.** *Proof of an Order in Council.*—In the audit, the existence and text of an order in council may be evidenced by:

(*a*) a copy of the Canada Gazette purporting to contain a copy of the order;

(*b*) a copy of the order purporting to be printed by the Queen's Printer; or

(*c*) a copy or abstract purporting to be certified to be true by the Clerk or assistant or acting Clerk of the Privy Council.

**38.** What, or how many, Ministers participated in a decision evidenced by an order in council is never a matter of audit concern. Until 1878 it was obligatory, so far as the Governor General was concerned, that at least four Ministers join in tendering advice; since then, the Instructions to him have taken no notice of the subject. Four is still regarded as a quorum but that is simply a "crystallised convention" in the words of Professor Mallory. (*Public Law,* 1957, p. 240)

**39.** Nor need an auditor hesitate in accepting as proof a rubber-stamped order in council or Treasury Board minute. While the law appears to be that a document may be regarded as signed "if the person himself" places on it "an engraved representation of his signature by means of a rubber stamp" (*Goodman v. Eban*), it is common knowledge that circulated orders in council and minutes are rarely personally rubber-stamped by the Clerk or Secretary, as the case may be. These are work copies, not duplicate originals. The original, personally signed by the Governor General or his Deputy, is of record in the Privy Council Office and, where necessary, the Clerk will certify a copy over his signature. Consequently, there need be no audit uneasiness when a work copy has been altered as a result of a direction from the Clerk's Office—the change may be to correct a typing error, etc.

**40.** *Orders and Regulations.*—Normally, a formal amendment is necessary to vary a regulation but sometimes legislation permits exceptions to be made by means of an Executive order applicable to a particular case only. The point is of limited audit interest but an illustration is now given: The Dominion Lands Act, 1908, empowered the Governor in Council to make both Orders and Regulations and the distinction between them was considered in 1953 by the Judicial Committee of the Privy Council, an extract being:

> ... it may be pertinent to ask for what reason the Acts of 1886 and 1908 provided that some things could be done by regulations and some by order. That this was done deliberately admits of no doubt. The only question is "why?" Their Lordships can only suppose the explanation to be that a regulation normally (though perhaps not quite necessarily) applies uniform treatment to everyone or to all members of some group or class. There is one and the same 'rule' *('regula')* for all. On the other hand, there may be special cases which the rule did not contemplate (*'casus omissi'* are expressly instanced in the Acts) or to which, owing to special circumstances, it cannot apply without hardship, or without violating the spirit—

'the true intent'—of the Act; and the object of the 'order-making' power is to enable the Crown to make special and equitable provision *ad hoc* for such cases. *(Atty. Gen. for Alberta v. Huggard Assets Ltd.)*

**41.** A statutory regulation need not necessarily originate with the Governor in Council; sometimes the power is vested in Treasury Board or in some Minister, board, commission, person, etc., as an agent or servant of the Crown. The Regulations Act, c. 235, R.S., requires that when statutory regulations are made they be transmitted to the Clerk of the Privy Council who is to cause them to be published in the Canada Gazette. The Act provides, however, that failure so to do does not invalidate but no person is liable to conviction for an offence of the regulation unless: (*a*) the Governor in Council had specifically exempted from the publishing requirement or the text expressly made the regulation operative prior to publication, and (*b*) reasonable steps had been taken to bring the purport to the notice of those likely to be affected by it.

**42.** *Orders in Council Generally.*—The foregoing refer to situations where some statute regulates action. In a wide variety of administrative situations it is discretionary whether limitations be associated with the exercise of ministerial powers as heads of departments by requiring concurring Executive authorizations. Statutes establishing departments declare that the Minister over the department has the management of its affairs, so in the audit it is normally regarded that a Minister requires Executive concurrence only where the law, constitutional practice or the rule of collective responsibility necessitates evidence of general concurrence in the form of an order in council, Treasury Board minute or Cabinet directive.

**43.** The audit is with respect to the parliamentary interest only. For example, various administrative rules and regulations lack appropriation-audit significance although they regulate expenditures. To illustrate, the text of a vote determines whether it is permissive to charge travel expenses, so a charge does not automatically come within the ambit of section 70 of the FA Act because some payment is in conflict with a provision in the general travel regulations, which are 'housekeeping' directions. Audit action, in noting an infraction of such directions, is by use of section 72 of the FA Act.

**44.** Where administrative regulations are not necessitated by some enactment, Audit Office practice is to assume that a degree of discretion is exercisable in application; for example, the originating authority may make an exception without amending the regulations. It is also regarded by the Audit Office that, where a matter relates to finance, Treasury Board may now give directions, although the regulations were made by the Governor in Council; the Board, of course, may not vary the policy of the regulations. It is also accepted in the audit that in unusual circumstances a Minister, subject to his obligation to his colleagues, may modify application in a particular case of minor monetary significance. However, an auditor may never regard a departmental officer as enjoying a power to modify a direction of the Governor in Council or Treasury Board.

**45. Cabinet Directives.**—In the sense that it is known to the law, the Cabinet makes its decisions by orders in council. However, as a political policy-making body it may take decisions that do not require the concurrence of the Governor General in order to have effect. Therefore, in the course of audit it may be observed that a department has a Cabinet 'directive' with respect to the policy applicable to certain Consolidated Revenue Fund transactions. What is the audit interest?

**46.** Civil servants must respect it and in the event of failure so to do the Auditor General will personally take such notice as is expedient in the circumstances, but only in extraordinary circumstances will a Cabinet directive be regarded as a public document of which notice is taken in the published report. A directive may take such form and issue in such manner as the Prime Minister decides. Where it is indicated that it is to be treated as a confidential document, Office application is subject to a provision in section 66 of the FA Act:

> **66.** (3) The Auditor General shall require every person employed in his office who is to examine the accounts of a department pursuant to this Act to comply with any security requirements applicable to, and to take any oath of secrecy required to be taken by persons employed in that department.

**47. Treasury Board.**—The Board draws its general authority from Part I of the FA Act. It consists of the Minister of Finance as Chairman and five members of the Privy Council named by the Governor in Council. The Act permits the Board to settle its rules of procedure but an order in council of 21 June 1957 fixes the quorum as three. Section 4 authorizes the Chairman to designate an officer of the Department of Finance to serve as Secretary. Treasury Board is a statutory body and, when acting within its statutory powers, a concurrence by the Governor General is not required.

**48.** *The Field of the Board.*—Powers specifically vested by statute in the Board do not require comment; it is the scope of section 5 (1) of the FA Act that is sometimes perplexing in the audit. It reads:

> **5.** (1) The Treasury Board shall act as a committee of the Queen's Privy Council for Canada on all matters relating to finance, revenues, estimates, expenditures and financial commitments, accounts, establishments, the terms and conditions of employment of persons in the public service, and general administrative policy in the public service referred to the Board by the Governor in Council or on which the Board considers it desirable to report to the Governor in Council, or on which the Board considers it necessary to act under powers conferred by this or any other Act.

**49.** It will be observed that the Board is declared to be a committee of the Privy Council, but so also is the Governor in Council; moreover, in the constitutional sense the Cabinet collectively is answerable to Parliament for decisions made either by the Governor in Council or Treasury Board. So regarded, the section is 'housekeeping' in aim, i.e., to indicate that Parliament consents to a devolution of business from the Cabinet as a whole to the smaller Board. However, the words "general administrative policy in the public service" would seem to imply that the subsection does not extend to matters where private rights are involved, expropriation of property being an example. For reasons such as the foregoing, Audit Office practice is to assume that, where Treasury Board exercises

statutory powers of the Governor in Council, some order in council must evidence the delegation to it. Where legislation does not regulate Executive action, no audit search for authority need be made.

**50.** *Decisions of the Board.*—The Board instructs and authorizes Ministers over departments; it does not administer. This is to be borne in mind in the audit because sometimes there are Board letters that advance points of view rather than instruct. Moreover, it is sometimes observed that members of the Board's staff proffer opinions in reply to departmental queries. In the audit, no sanction for a transaction may presume to be thereby established because the Board only may instruct.

**51.** Treasury Board has the power to give many directions which do not require the concurrence of the Governor in Council and there is no statutory direction as to the manner in which these are to be evidenced. Section 3 (3) of the FA Act leaves that to the Board:

> (3) Subject to the terms of this Act and any directions of the Governor in Council, the Treasury Board may determine its own rules and methods of procedure.

A formal minute signed by the Secretary, and sometimes sealed, is generally used when Board approval is, by statute, required for the doing of some act or thing. Sometimes a letter purports to clarify and occasionally to broaden a minute already circulated. In considering whether these may be accepted as amendments, auditors will bear in mind that Board practice generally is that the Secretary drafts and issues suitable texts after decisions are taken. Should such a text require clarification, a communication of the Secretary may be regarded as an official revision of the original direction provided it is not contradictory in principle.

**52. The Prime Minister.**—Constitutionally, selection is by the Governor General as an exercise of the prerogative. No order in council is required. His status is:

> The Prime Minister stands between the Crown and the Cabinet; . . . it is the Premier who acts as the connecting link with the Cabinet as a whole, and communicates . . . their collective opinion. To such an extent is he the representative of the Cabinet in its relations to the Crown that whereas the resignation of any other Minister creates only a vacancy, the resignation of a Premier dissolves the Cabinet altogether. (Lowell, *The Government of England,* vol. 1, p. 71)

**53.** The Prime Minister may at any time act 'for' a member of his Cabinet. Chalmers and Asquith (*Outlines of Constitutional Law*) accept as fundamental that "he assumes responsibility for all the activities of his colleagues". In Canada, it has been accepted since the days of the cabinet of Sir Charles Tupper in the 1890s that no Minister may make recommendations to Council affecting the discipline of another Minister's department, but the Prime Minister may; however, where the exercise of a statutory duty touching private rights, etc., is involved, it is customary that the Prime Minister be first designated Acting Minister by order in council.

**54.** *Acting Prime Minister.*—The Prime Minister, whose functions are not regulated by statute, may designate a member of the Cabinet (he need not hold a portfolio) as Acting Prime Minister during a period of absence from Ottawa. The selection being a personal act of the Prime Minister, no order in council need evidence the decision. Practice is to assume that an Acting Prime Minister may exercise all powers of the Prime Minister relating to routine of administration. As the audit task does not extend into the area of public policy, the powers of an Acting Prime Minister in the broader field need not be reviewed. Canadian usage is to assume that in the event of illness, etc., the Minister who last acted as Acting Prime Minister or, in his absence, the senior ranking Privy Councillor, is automatically the designated substitute. Should it be that the Prime Minister is also the head of a department, an order in council is necessary to name an Acting Minister, but it is not obligatory that the Minister named be he who is Acting Prime Minister.

**55. Ministers.**—A Minister heads each department and practice is to evidence appointment by order in council (section 131 of B.N.A. Act). No Canadian statute requires that a Minister take an oath of office. In practice, an oath is administered:

I..... do solemnly swear and sincerely promise and swear that I will duly and faithfully and to the best of my skill and knowledge execute the powers and trusts reposed in me as Minister of..... So help me God.

**56.** The number of Ministers in a Government is a decision of the Prime Minister, but salary payments may be made only to those listed in the Salaries Act or other legislation. The reason is that of safeguarding the independence of Parliament against bribery by the Crown. The B.N.A. Act does not require that a Minister be a member of the Senate or House of Commons, but if a Minister does not become a member within a reasonable time — as measured by the House of Commons — the doctrine of responsible government would be scuttled. The fact that a Minister is not a Member of Parliament does not limit his authority over a department, nor does defeat in election impair either legal authority or right to salary.

**57.** The death or resignation of the Prime Minister automatically ends the term of office of all members of the Cabinet. This is a constitutional usage founded on the consideration that each Prime Minister must enjoy the power to compose his Cabinet. If a Minister resigns, the date of formal acceptance influences salary payments. In this regard, auditors will be guided by section 11 of the Interpretation Act:

**11.** Where an Act, or any order in council, order, warrant, scheme, letters patent, rule, regulation, or by-law, made, granted, or issued, under a power conferred by an Act,

(*a*) is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day;

(*b*) is expressed to expire, lapse, or otherwise cease to have effect on a particular day, the same shall be construed as ceasing to have effect immediately on the commencement of the following day.

**58.** *Acting Ministers.*—In section 31 of the Interpretation Act is to be found:

> words directing or empowering a Minister of the Crown to do any act or thing, or otherwise applying to him by his name of office, include a Minister acting for, or, if the office is vacant, in the place of such Minister, under the authority of an order in council, and also his successors in such office, and his or their lawful deputy.

An acting Minister must be a cabinet member, but it is not imperative that he hold a portfolio. It is customary for the same member of the Government to function (without a new order in council) as acting Minister whenever a Minister is again away or is incapacitated through illness, etc. Appointment does not make an acting Minister eligible to the salary of the Minister even when the office is vacant, but in such circumstances the acting Minister may, with appropriate consent, set up a provisional secretarial establishment.

**59.** *Associate Ministers.*—An associate Minister appointed under the authority of a statute differs from an acting Minister in that he holds an office, is entitled to salary and has full capacity to exercise and perform such of the powers, duties and functions of the Minister with whom he is associated as may be assigned to him by statute, order in council or the Prime Minister. In all matters relating to administration, an auditor will assume, in the absence of some limiting direction, that an associate Minister exercises the same ministerial authority as does the Minister with whom he is associated. Being a member of the Cabinet, he may be designated, by order in council, acting Minister over any other department.

**60.** *Parliamentary Assistants.*—Unlike a Minister, a parliamentary assistant need not be a Privy Councillor. He is not the holder of an office in the Executive Government but is, as a Member of Parliament, a person selected

> to assist a Minister of the Crown in such manner and to such extent as the Minister may determine and to represent his department in the House of Commons in the absence of the Minister therefrom.

**61.** While there were a few World War I appointments, the use of parliamentary assistants really dates from 1943, so far as Canada is concerned. On 20 April 1943 the then Prime Minister was queried as to the situation resulting were a portfolio to become vacant. He replied:

> Where a new Minister is not appointed, an acting Minister is always immediately appointed when a Minister unfortunately passes away or resigns. The parliamentary assistant will remain the assistant to the acting Minister. The responsibility will be on a member of the Ministry all the time. The parliamentary assistant to the Minister will not relieve the Minister of his responsibility. (Debates, p. 2366)

Consequently, in the audit it will be regarded that no exercise of statutory power may be delegated to a parliamentary assistant.

**62.** *Responsibilities of Ministers.*—No Minister can give detailed personal supervision to a large department. He is, however, as was said in *Local Government Board v. Arlidge,* "answerable in Parliament for every departmental act". This was qualified by the observation that

> he is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he . . . should do everything personally would be to impair his efficiency.

This case involved the exercise of a statutory discretion, but is of audit interest because it declares that every departmental determination issued in correct form stands as a deliverance of the Minister for which he is answerable to Parliament. Thus in the constitutional sense, a Minister is answerable for many decisions of which he may have little or no personal knowledge.

**63.** A distinction is to be drawn between a Minister as a person and as a member of the Cabinet. To illustrate, sections 31 and 32 of the FA Act permit Ministers to delegate to officers the power to requisition for payments and to give certificates as to services performed, etc. A Minister may revoke the authority at any time, but a change of Ministers over a department, even on a change of Government, is not regarded as automatically terminating the delegations to departmental officers. The naming is simply an act of government to facilitate performance of public functions, the need continuing to exist regardless of changes at the top. In turn, a Minister is never personally liable for public debts contracted in appropriate manner. This rule is one of long standing and stems from a suit brought against Haldimand, the Swiss soldier of fortune who was military governor of the Three Rivers District in the 1762-64 period and later commander of all British forces on this continent. He was sued for goods supplied for the use of the forces. It was decided it would be contrary to the public interest were a man held liable by reason of his official position because "no man would accept of any office of trust under Government upon such conditions". (*Macbeath v. Haldimand*).

**64.** *Execution of Statutory Duties.*—Where there is a statutory direction that something be done with the approval of or to the satisfaction of a Minister, or under rules made by a Minister, an auditor generally expects that the Minister or the deputy head be personally identified with the decision and that responsibility may not be delegated. As a rule, these decisions are in writing, but it does not necessarily follow that, in the audit, the original be examined; circumstances will decide in each case. For example, printed or mimeographed directives issued by a department, and purporting to carry the approval of the Minister, may be accepted as the equivalent of original documents bearing his signature.

**65.** *Applying Orders in Council.*—Once an agreement is the subject of an Executive order a department may not vary, in substance, the terms. An illustration may be drawn from *The King v. Peat Fuels Limited*:

> ...the Deputy Minister of Mines notified the defendant in writing that the lease would expire on October 31, 1928, "and that the only option now remaining to the company to secure return of the plant and equipment leased was by compliance with clause 11 of the agreement." The wording of this notice might give rise to an inference that in the opinion of the Deputy Minister it was optional with the defendant to take over the property and plant. If this was his opinion it was clearly erroneous and in any event the Crown is not bound by the error or inadvertence of its officers, nor would the Crown be bound by any deliberate intention of its officers without proper authority to alter the terms of a written agreement, and no such authority was established by the evidence.

However, auditors will bear in mind that, when an authorization to a Minister is general in terms, he may insert whatever conditions he deems desirable.

**66. Deputy Head.**—While the several statutes establishing departments provide for appointment by the Governor in Council of deputy heads and fixing salary, a general authority is section 6 of the Civil Service Act. Section 7 (2) of the same Act provides that:

> A deputy head shall give his full time to the Civil Service, and shall discharge all duties required by the head of the department, or by the Governor in Council, whether such duties are in his own department or not.

**67.** *Powers of a Deputy.*—A deputy head is an official, consequently while section 31 of the Interpretation Act permits the "lawful deputy" of a Minister to exercise powers of the Minister, it seems reasonable to distinguish between decisions relating to 'administration' and 'policy'. A deputy head symbolizes the civil service, and Arthur Balfour aptly pointed out, in an introduction to Bagehot's *The English Constitution,* that the permanent officers do not

> control policy; they are not responsible for it. Belonging to no Party, they are for that very reason an invaluable element in Party Government. It is through them, especially through their higher branches, that the transference of responsibility from one Party or one Minister to another involves no destructive shock to the administrative machine.

**68.** In all ordinary 'business' acts of departmental administration—using a phrase of the 1932 United Kingdom Committee on Ministers' Powers—a decision of a deputy head is as effectual as that of his Minister. Where a decision has policy implications, it is generally evidenced by the Minister, for he is answerable to Parliament. To illustrate, in *Point of Ayr Collieries v. Lloyd George,* a point in issue was the power of the permanent head of a department to sign an order taking over the control of the collieries. The validity was upheld, but it was observed:

> . . . in a case of such importance as this, signature by the Minister himself might appear to be more appropriate than signature by someone on the staff of the Ministry, however highly placed . . . The obvious advantage of having matters of this high importance signed by the Minister is to take away any possibility of suggesting that he personally has not given attention to the case.

**69.** *Acting Deputy Head.*—The status test is set out in section 8 (1) of the Civil Service Act:

> **8.** (1) Unless otherwise provided by the Governor in Council, in the absence of a deputy head, the assistant deputy head, or if there is no assistant deputy head, or the assistant deputy head is absent, an officer or clerk named by the head of the department shall have the powers and perform the duties of the deputy head.

**70. Undertakings Given by Civil Servants.**—A British Army Officer was given a letter from a senior officer of the War Office accepting a physical disability as attributable to military service and qualifying him for pension. Later, the Ministry of Pensions rejected the claim and litigation followed. It was held that a pension should be granted because:

> Whenever government officers, in their dealing with a subject, take on themselves to assume authority in a matter with which he is concerned, he is entitled to rely on their having the authority which they assume. He does not know, and cannot be expected to know, the limits of their authority, and he ought not to suffer if they exceed it. *(Robertson v. Minister of Pensions)*

However, the trend of decisions since has been to whittle this down whenever the power to decide is regulated by statute. To illustrate, a collector of customs in Ceylon ordered some warehoused goods to be sold in order to recover storage charges, etc.; a sale was held with bidders assuming the collector had requisite authority under the Customs Ordinance. As a matter of fact, he had no jurisdiction over the goods in question and the sale was set aside. The Privy Council decision took notice of the fact that hardships can result by the obligation being on him who treats with a public officer to prove that the officer had authority to act, but:

to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorized acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one. *(Atty. General for Ceylon v. Silva)*

Auditors will bear in mind that the point now discussed is the capacity to act in a field regulated by legislation.

**71.** Occasionally a federal officer acts under provincial legislation and sometimes there is the converse. In the audit it is regarded that no provincial statute can establish a charge on Consolidated Revenue Fund of Canada. Conversely, a province may not be bound to pay money to the Government of Canada. To illustrate, a strike in Cape Breton resulted in a county court judge reporting to the Attorney General of the Province of Nova Scotia that a situation existed beyond the capacity of the police to control. The Attorney General notified the District Officer Commanding to call out the Active Militia. This was done and ultimately $133,000 was demanded from the province for expenses thereby incurred. The province refused to pay and the matter was referred to the Supreme Court of Canada for an interpetation of the Militia (now National Defence) Act. The Act provides that the Attorney General of a province may requisition the Forces "on his own motion or upon receiving notification from a judge of a superior or county or district court", with another section stating that resulting expenditures "shall be paid to His Majesty by the province". There was no dispute as to amount, the point in issue being the status of the Attorney General when he acts under what is now section 221 of the National Defence Act of Canada. A part of the headnote reads:

The Militia Act envisages the Attorney General, not in his capacity as Attorney General to His Majesty as the Sovereign Head of the province, but as a person in whom certain powers are vested and on whom certain duties are laid by the statute. These sections apply to every province and go into operation independently of the scope of the Attorney General's authority to bind the province in respect of the expenditure of moneys for such purpose. Therefore these enactments do not contemplate a duty to pay, proceeding from a contract between the province and the Dominion. (*Re Liability of Nova Scotia*)

## The Audit of Revenue

**72. Introductory Note.**—Constitutionally, the prohibition is absolute against imposing a levy without clear parliamentary consent. Although the Executive may do many things during a national emergency by relying on the War Measures Act (currently the all-embracing piece of legislation in the statute books), this statute may not be relied upon to impose a levy. A comparable British Act was involved in a decision where it was said:

> in view of the historic struggle of the Legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department. (*Atty. Gen. v. Wilts United Dairies*)

**73.** *Consolidated Revenue Fund.*—Another constitutional rule requires that all money coming into the hands of public officers flow into Consolidated Revenue Fund. The origin is, of course, English and dates from Henry VIII. The king's revenues were then collected by sheriffs of counties and other high-placed persons who came to London periodically, or when they felt like it, to make an accounting at the Exchequer. Few among them could read or write—a matter of significance because settlements were made in a room into which only persons with patents of nobility might enter. Scribes being barred, the settlement of accounts was one of bargaining with gold and silver on the table. The complaint of Henry is recited in the preamble to the Collectors of Tolls Act, 1542-3:

> divers and soondrie highe collectoures . . . and divers other particular and generall receyvoures of the revenues and dueties . . . have heretofore after the collection . . . reteyned occupied and converted the same to theyre owne singular proffite and commoditie, as in loning or laying out the same for gaynes, in purchasing lands of greate value, and in bying of woolles and other merchaundyse, whereby the King's Majestie hathe ofte tymes lost greate parte of his debtes and dueties, and soomtyme forborne the same by a long season after suche tyme as the same have been due and gathered.

The Act directed that accountings be made every three months with a 20 per cent penalty added for each month of default. In addition, a defaulter automatically forfeited office and "all proffites thereunto belonging".

**74.** As early as 1795, Lord Dorchester was writing from Quebec to London about the conduct of customs officers sent to the Canadian colony. He urged that they be put on salary basis and thus end the evils of their "fees, profits and perquisites and all their dirty train". In another despatch he referred to the law officers and "the pecuniary speculations of the gentlemen in office, their connexions and associates". However, it was many years before there was a Canadian consolidated revenue fund controlled by legislatures. In the interval

the Governor exercised complete discretion in applying the revenues he received from Crown lands, tolls, etc., as well as the grants in aid by the Imperial Parliament; moreover, practice was that postal revenues and customs duties be accounted direct to London. Not until the 1840 Act of Union were public revenues of the colonies, generally speaking, credited to a general Consolidated Revenue Fund subject to appropriation. Up to the Act of Union the Post Office was a branch of the British Post Office and remained in that status for some years, but the Legislature of the Province of Canada in 1844 fixed postal rates for the first time. Until then, no rates being set for newspapers, charges were negotiated by publishers with the deputy postmaster general stationed in Canada, the proceeds being a personal perquisite. On 5 January 1844 an official charge of one-half penny per copy took effect. This materially reduced the official income of Deputy Postmaster General Stayner who had hitherto averaged over £3,000 a year and thus received three times the salary of the ranking officer of the colony of Canada. Perquisites then having characteristics of property, Smith notes:

> By way of compensation to the deputy postmaster general for the loss of his newspaper and other perquisites, he was given the not unhandsome salary of £2500 sterling a year. This was an amount much beyond what the [British] treasury considered should be paid as salary for this office, in the absence of the special circumstances of Stayner's case, and the salary of his successor was fixed at £1500 a year. (*History of the Post Office in British North America,* p. 241)

**75.** *Revenue Departments.*—Partly because of the special concern of the Crown in the raising of the Revenue and partly to secure impartiality in the collecting process, revenue officers and revenue departments were long distinguished from others. For example, until the Consolidated Revenue and Audit Act 1931 was replaced by the FA Act, no officer or person employed in the collection of the revenue could be compelled "to serve in any other public office, or in any municipal or local office, or on any jury or inquest, or in the militia". Revenue departments, in turn, enjoyed a right to use collections to pay costs incurred. Consequently, they were less dependent on parliamentary grants of supply than were departments generally. Section 103 of the B.N.A. Act still recognizes such an arrangement but it has long been accepted in Canada that the consent of Parliament should first be sought before the Crown employs the section.

**76.** The Department of National Revenue is obviously a Revenue department but a few words about the Post Office may not be out of place. Litigation in 1778 resulted in a decision that the British Post Office was both a branch of revenue and a branch of police. Lord Mansfield explained his conclusion in these words:

> As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown.

Despite the fact that the British Post Office has since become a great commercial enterprise responsible for the telephone and telegraph services, etc., as well as the mails, the English Court of Appeal in 1957 found no difficulty in reaching

a like conclusion when considering the liability of the Post Office for the loss of two packages of diamonds valued at more than £21,000. They were mailed to a New Zealand address but were stolen by a Post Office employee while still in England. A proviso in the registration receipt limited liability to about £6 so the effort was to establish that the Post Office was a common carrier and as such had contracted to safeguard and deliver when it accepted the parcels. This was rejected:

> It is, of course, clear that if A entrusts a letter to B to be carried to C, and B receives remuneration for his services, a contractual tie results between A and B. It is also clear that H.M. Postmaster General has power to contract; and the only question here is whether, when A entrusts to the Post Office a postal packet for transmission overseas, a contractual tie results. Clearly the Postmaster General is in a quite different position from that of a private individual. He is responsible to the Crown for running a public service and, incidentally, a monopoly. The money that is paid by the public is revenue. So far as this case is concerned, I find it unnecessary to go further into these arguments, because, as it seems to me, there are three matters which, taken together at any rate, are conclusive against the appellants in this case. (Parker L. J., in *Triefus & Co. v. Post Office*)

Consequently, in the audit it is to be borne in mind that, in the event of a loss, it does not automatically follow that Post Office is obligated to make good beyond the amount provided by Post Office regulations.

**77.** *The Reporting of Revenue.*—Up to 1942, departments independently settled revenue classifications, but on 12 March 1942 the Governor in Council gave instructions. This action was taken for several reasons, one being to distinguish between tax and non-tax revenue, while another was founded on the consideration that:

> In connection with various financial surveys ... it has been found necessary to recast the published figures into groupings suitable for year-to-year comparisons. A comprehensive classification established in the day-to-day accounting procedure would keep this useful information available at all times.

Elsewhere in the order in council it was noted that "general administrative requirements" would be better served were a reasonably detailed reporting made of tax revenues, and that the use of classified headings for non-tax revenue "would simplify operations involved in reporting and recording". In short, the changes were for purposes of administrative convenience. Since then the FA Act has taken effect and presumably it is now within the official discretion of the Minister of Finance to vary classifications of the 1942 order in council.

**78.** *Statement Classifications.*—Section 67 of the FA Act requires the Auditor General to ascertain whether a "proper allocation" was made of Revenue—in particular, whether the statement lists only revenue of the fiscal year. In certain circumstances, the FA Act tolerates April expenditures relating to the old year being charged to that year, but there is no like permission with respect to April revenues.

**79.** The Auditor General certifies the statement, and an audit duty being to consider classifications used, reference is now made to a few.

**80.** *Tax Revenues.*—In some statutes the word 'imposts' appears, so a question may be: What is the difference between an impost and a tax? An impost is a tax but the word 'impost'

is more appropriate when payment has a direct association with a particular article. The Oxford dictionary uses a customs duty to illustrate and the Supreme Court of Canada has also noted that customs duties

> are, no doubt, in at least one aspect, 'taxation' within the meaning of that term as ordinarily used ... they are a mode or system of taxation for the raising of money and are a typical form of indirect tax. But they are ... something more, they are tolls levied at the border as a condition of permission to import goods into the country being granted by the governmental authority clothed with jurisdiction either entirely to prohibit their entry or to prescribe conditions on which such entry may be effected. (*Atty. Gen. of B.C. v. Atty. Gen. of Canada*)

**81.** *Return on Investments.*—Under this heading all returns from assets listed in the Statement of Assets and Liabilities should be included, but audit exception need not be taken if income from capital assets, not so listed, is also included.

**82.** *Privileges, Licences and Permits.*—Practice is to treat moneys received from licences required by a taxing statute as tax revenue and to list under this classification licence moneys received under the provisions of non-tax statutes. Illustrations are Food and Drug Act licences, timber permits, Patent Act fees, the charge for passports, etc. When a doubt as to classification arises, auditors will bear in mind that a grant of licence makes lawful what otherwise would be unlawful, so a payment always qualifies under 'tax revenue'.

**83.** *Services and Service Fees.*—In the paragraph above it is noted that 'Permits' are regarded as including fees where the grant conveys a right. However, this classification includes fees where incidentally a right is acquired whenever the real purpose of the charge is to recover all or part of the cost incurred in providing a service.

**84.** *Ordinary Revenue.*—Until the 1930s, various headings were used to classify the total of receipts in a year. One was 'Ordinary' with the use dating from feudal times when it then meant the king's property in:

> feudal dues, taxes raised from Jews, *bona vacantia,* whales, sturgeons, waifs, strays, perquisites connected with the judicature, and other miscellaneous sources of income. (Chalmers and Asquith, *Outlines of Constitutional Law,* p. 169)

For example, in those days the Jew enjoyed no legal rights and presence in the kingdom was an act of regal tolerance but subject to such conditions as the sovereign might impose, therefore the Commons regarded levies on Jews as something outside their purview. It being then regarded that the prime obligation was on the king to find the money necessary for the government of the country, levies on the people by Parliament were called 'Extraordinary'. These classifications, naturally, were reversed when George III surrendered the hereditary revenues in exchange for fixed annual allowances.

**85.** In Canada, revenue that is exceptional is still sometimes segregated to avoid distorting between-years comparisons of revenue reported and, because of the growing significance of the statutory Statement of Assets and Liabilities, a recognized practice also is to make certain adjustments directly through the Net Debt account. An example is a credit resulting when a balance, written off as an expenditure in a previous year, is set up as an asset for the purposes of the Statement of Assets and Liabilities.

**86.** *Definition of Public Money.*—Section 16 of the FA Act requires that "all public money" be deposited to the credit of the Receiver General, whereupon it forms part of Consolidated Revenue Fund. From time to time efforts have been made in legislation to give the term "public money" an all-embracing meaning.

In the 1840 Act of Union "all duties and revenues" was used to describe the moneys to go to the credit of the new Consolidated Revenue Fund. Duties are revenue, but customs collections were up till then reported to London because practically all overseas imports entered via the St. Lawrence, thus making necessary an arrangement that would avoid disputes between the authorities of Lower and Upper Canada. In the Act of Union the word "duties" was associated with "revenue", presumably to indicate that the imperial authorities were relinquishing claims to customs receipts. Section 102 of the B.N.A. Act repeats the phrase, perhaps because it was in the Act of Union or because of some existing practice in a province entering Confederation. The expression also appears in the statutory definition of "public money" in the FA Act, probably because of the text of the B.N.A. Act.

**87.** Financial legislation in 1868 was, of course, provisional and it was not until the first Consolidated Revenue and Audit Act was enacted in 1878 that the Parliament of Canada attempted an all-inclusive definition. It was:

"public moneys", "public revenue" or "revenue", mean and include and apply to all revenue of the Dominion of Canada, and all branches thereof, and all public moneys whether arising from duties of customs, excise or other duties, or from the post office, or from tolls for the use of any canal, railway or other public work, or from fines, penalties or forfeitures, or from any rents or dues, or any other source whatsoever, whether such moneys belong to Canada or are collected by officers of Canada for or on account of or in trust for any province forming part of Canada, or for the Government of Great Britain or otherwise.

**88.** This definition was used until 1931 when the following words were added after "thereof" in the second line:

including any fees required to be paid under any rule or standing order of the Senate or House of Commons, and moneys received through the sale or pledge of securities and moneys borrowed.

In addition, the text after "officers of Canada" was changed to read:

for or on account of special purposes or in trust for any person or for any province forming part of Canada, or for the Government of Great Britain, or otherwise.

**89.** The first change was to clear up a situation that originated in the House of Commons in 1929. Motions to remit fees for private bills withdrawn were, for the first time, rejected by the Speaker. His explanation was:

It is essentially contrary to section 35 of the Consolidated Revenue Act [now section 16 of the FA Act], which stipulates that any fees received by the officers of the House shall be deposited at the bank, when they become the property of the Receiver General of Canada. To remit such fees would require an estimate from the Minister of Finance. (Debates, 14 June 1929, p. 3762)

This ruling was not, of course, binding on the Senate, so a degree of inconsistency in practice existed until the definition was amended and what is now section 21 of the FA Act inserted:

**21.** Where the Senate or House of Commons, by resolution or pursuant to any rule or standing order, authorizes a refund of public money that was received in respect of any proceedings before Parliament, the Minister may pay the refund out of the Consolidated Revenue Fund.

**90.** The 1931 change at the end of the definition was of greater administrative significance. What was done was to add the words "special purposes" and to take notice of moneys held for "any person" as well as for other governments. The purpose was to control practices when departments hold money, for one reason or another, on behalf of some person. An illustration might be money received by the Department of Agriculture to purchase a purebred animal for a farmer.

**91.** An auditor may wonder why it was considered necessary to insert the words "special purposes" in view of the fact that "in trust" was already in the text. It was regarded as debatable whether the obligations of a trustee could, or should, be voluntarily assumed by a department because that might be action in an area constitutionally reserved to Parliament. The status of a department when accepting the money being really that of an agent, and "special purposes" having no established technical meaning, the expression was selected to indicate generality in application.

**92.** Such is the background to the present definition in the FA Act, which differs from its predecessor in that the aim was to avoid particularization lest some unstated type of receipt later bob up as had in the past. For example, Wynes notes that in the Australian constitution:

it seems that the words "revenues or moneys" do not include loan moneys which have always been kept separate, and moreover "moneys" is probably to be read *ejusdem generis* with "revenues". (*Legislative, Executive and Judicial Powers in Australia,* 2nd ed., p. 476)

During World War I the question arose in Canada whether proceeds of loans were included in the then definition of public money and opinion was that probably they were not. That is why notice is taken of the proceeds of borrowings in the FA Act definition, which reads:

"public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes

(i) duties and revenues of Canada,
(ii) money borrowed by Canada or received through the issue or sale of securities,
(iii) money received or collected for or on behalf of Canada, and
(iv) money paid to Canada for a special purpose.

**93.** *Special Purposes Accounts.*—Unlike the previous statute, the FA Act defines special purposes moneys:

**2.** (*k*) "money paid to Canada for a special purpose" includes all money that is paid to a public officer under or pursuant to a statute, trust, treaty, undertaking, or contract, and is to be disbursed for a purpose specified in or pursuant to such statute, trust, treaty, undertaking or contract.

The words that may present an audit problem are "undertaking or contract". It is to be borne in mind by auditors that an undertaking may be given only when, having regard to all Acts of Parliament, it is permissive to agree to act in a certain way. To illustrate, an undertaking by a collector of taxes that money paid will be earmarked for a certain purpose would be ineffectual to open a special account. Nor may an order in council or Treasury Board minute waive a right to public receipts. An illustration of an irregular administrative diversion is provided in a decision of the British Public Accounts Committee. During

World War II, film units of the Army produced a spectacular film called "Desert Victory" and it was exhibited internationally. Receipts from first showings in various places were, with the consent of the Treasury, credited to Service welfare funds. The Committee was sympathetic but, from the viewpoint of principle, declared:

> Your Committee desire to endorse the contention of the Comptroller and Auditor General that receipts arising from the use of public property should in principle be accounted for as public funds. (1945 Committee Reports)

**94.** A commonplace illustration is the commission received for permitting the installation of telephone booths in public buildings for the convenience of the public. A department desired to divert the commission paid with respect to pay phones in veterans hospital buildings to non-departmental welfare activities in the buildings. A Treasury Board ruling was that:

> As these commissions result from activities carried out in government buildings and as they are currently paid into the Consolidated Revenue Fund, it would not be possible to divert them to private organizations without authorization by Parliament.

**95.** The audit the Office performs of special purposes accounts is primarily to observe (*a*) whether it is permissive to segregate, (*b*) safeguards employed and (*c*) that disbursements were for the named purpose. Unless the law requires the Auditor General to certify as to the state of the account or he has undertaken to do so, there is no legal obligation to pursue the interests of the person who turned over the money. However, where the depositor is another public authority, a general audit certificate is sometimes expected, but only in exceptional circumstances need the 'merit' of expenditures charged to the account be reviewed.

**96.** *Accounts of Other Governments.*—A special account financed by another government is not one of official interest to the Parliament of Canada, nor is the Canadian department administering the account answerable to the legislature that appropriated the funds—its status is that of an agent of a department of another government. Commonwealth Auditors General have mutually agreed that when the auditor general of the disbursing Government certifies such an account, (*a*) it is an administrative act performed for the benefit of the department of the Government which provided the money, (*b*) no report would normally be made to the other auditor general, and (*c*) the obligation is on the latter to make whatever examinations he considers necessary.

**97.** *Moneys of the Courts.*—Neither the Chief Justice of Canada nor the President of the Exchequer Court has any responsibility to Parliament or the Receiver General with respect to "public moneys" paid to Registrars of the Supreme and Exchequer Courts of Canada. For example, section 18 of the Supreme Court of Canada Act, c. 259, R.S., provides that the Registrar publish decisions of the Court, but it is the Minister of Justice who is answerable for the financial transactions. While tariffs of fees are fixed by each Court, the statutes direct payments to be made:

> by means of stamps issued for that purpose by the Minister of National Revenue, who shall regulate the sale thereof; and the proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada. (Sections 80 of Exchequer Court Act and 106 of the Supreme Court of Canada Act)

## Part I—The Accounting Audit

**98. The Audit Obligation.**—Section 67 of the FA Act permits the Auditor General to perform the Revenue audit in such manner as he "may deem necessary" but the audit is to be of a nature as will establish whether:

(*a*) the accounts have been faithfully and properly kept, and

(*b*) all public money has been fully accounted for, and the rules and procedures applied are sufficient to secure an effective check on the assessment, collection and proper allocation of the revenue.

Then section 70 of the Act directs that the Auditor General bring to the notice of the House of Commons "every case" observed in the course of audit where:

(i) any officer or employee has wilfully or negligently omitted to collect or receive any money belonging to Canada,

(ii) any public money was not duly accounted for and paid into the Consolidated Revenue Fund, and

(iii) there has been a deficiency or loss through the fraud, default or mistake of any person.

**99.** Section 98 of the FA Act treats with the Public Officers Guarantee Account and requires a listing in the Public Accounts of all "defalcations or other fraudulent acts or omissions" of public officers. To a degree, sections 70 and 98 cover the same ground, therefore, because the audit may be performed by means of tests, the more embracing disclosure is that required by section 98. In considering application given to the section, it is to be borne in mind that a breach of trust or fraud is a requisite to bring a loss within the phrase "defalcations or other fraudulent acts"; in other words, a theft of public property by a public employee is not within the ambit unless he had some responsibility with respect to its safekeeping. The Office view is that the phrase "mistake of any person" in section 70 is referable to something deliberately done incorrectly or in a grossly careless manner that results in a loss of Revenue. Put another way, it would not necessarily be a "mistake" for the purposes of the section were the person responsible unwittingly to forget to lock a safe and a theft resulted.

**100. Deposit of Public Money.**—Parliament also wants to be informed whether there has been any diversion or misapplication of money received. For that reason, section 16 of the FA Act requires that:

**16.** (1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General.

(2) The Minister shall establish, in the name of the Receiver General, accounts with such banks and fiscal agents as he designates for the deposit of public money.

(3) Every person who collects or receives public money shall keep a record of receipts and deposits thereof in such form and manner as the Treasury Board may prescribe by regulation.

(4) Every person employed in the collection or management or charged with the receipt of public money and every other person who collects or receives public money shall pay all public money coming into his hands to the credit of the Receiver General through such officers, banks or persons and in such manner as the Minister directs.

"Person" in subsection (4) is to be regarded in the audit as including a Crown corporation where it is the agent or representative of a department in receiving public money. In other words, a statutory right to retain corporate income does



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not extend to moneys a department would be obligated to deposit forthwith to the credit of the Receiver General. Paragraph 26 in the 1955 Audit Report to the House of Commons provides an illustration. A department contracted with a subsidiary of a Crown corporation to operate certain public-owned telegraph facilities in northern Canada. The arrangement was with respect to a commercial service and was unobjectionable in terms, save that the agreement provided that the management fee, expenses of operation, etc., be deducted by the company from moneys collected in operating the service. The next Appropriation Act included a text to regularize the arrangement.

**101.** *Statutory Exceptions.*—The opening words of section 16 of the FA Act, "subject to this Part", are referable to section 19 (1) which reads:

> **19.** (1) Where money is received by a public officer from any person as a deposit to ensure the doing of any act or thing, the public officer shall hold or dispose of the money in accordance with regulations of the Treasury Board.

An example is a deposit received by Customs officers at border points guaranteeing re-export of samples of commercial travellers, etc. These are covered by regulations that permit the money to be held in a local bank account and returned to the individual concerned when the purpose has been served. The sum held is, of course, public money for the time being, but the audit interest is that of making certain that the department (*a*) suitably records, (*b*) properly safekeeps and (*c*) in due course either returns the money or deposits it to the credit of the Receiver General.

**102.** Auditors will observe that the above quoted subsection permits an officer to "hold or dispose", while the next subsection contemplates deposit in Consolidated Revenue Fund although the amount may be later returned, provided Treasury Board permits. It reads:

> **19.** (2) Where money is paid by any person to a public officer for any purpose that is not fulfilled, the money may, in accordance with regulations of the Treasury Board, be returned or repaid to that person, less such sum as in the opinion of the Board is properly attributable to any service rendered.

**103.** *Exceptions by Other Legislation.*—An illustration is section 39 of the National Defence Act, c. 184, R.S., which declares certain moneys associated with the internal operations of the Service Forces to be non-public and not subject to deposit in Consolidated Revenue Fund. The receipts of a Service Force canteen is an example. This exception stems from the powers of the Queen, as commander-in-chief of the Service Forces (section 15 of the B.N.A. Act), to regulate the internal administration of the Forces where Parliament has not assumed jurisdiction. A duty of the Auditor General therefore is to observe whether the Minister of National Defence causes, in conformity with section 39, non-public money accounts to be periodically audited. Parliament having intervened to that extent, any ministerial failure to arrange for the making of an audit could be a matter to draw to the notice of the House of Commons although the outcome of the audit would not be.

**104.** *Constitutional Exceptions.*—Exceptions from the rule that all moneys received be deposited to the credit of the Consolidated Revenue Fund really draw

their authority from section 103 of the B.N.A. Act. Two illustrations are now given: the Government Harbours and Piers Act, c. 135, R.S., provides that wharfingers, etc., may be paid out of tolls and dues collected, while section 20 of the Post Office Act, c. 212, R.S., reads:

**20.** Postal employees whose compensation is not provided for under the Civil Service Act or any other law, may be paid out of postal revenue such salaries, commissions and allowances as the Postmaster General may prescribe.

Whenever directions of this nature are encountered a revenue-producing service is involved and the practice existed at time of Confederation. Earlier in the chapter it was noted that in the days of colonial Canada it was British policy to make many colonial appointments on the basis of fees-of-office. The purpose was to avoid charges on imperial resources and to encourage holders to make their jobs self-supporting. Consequently, in 1840 many wharfingers, postmasters, etc., got their living by keeping all, or part, of the money they officially collected. They held offices of profit and such an office was deemed to be property which could not be taken away without compensating the holder. That is given by some writers as one reason why the 1840 Act of Union provided that:

the expenses of the collection, management and receipt of the said Consolidated Revenue Fund shall form the first charge thereon.

In other words, the creating of a consolidated revenue fund was not, by a side-wind, to destroy property rights. By 1867 the Post Office had become a Canadian department of government and the practice had become more general of paying fixed salaries to public employees; nevertheless, section 103 of the B.N.A. Act provides that:

**103.** The Consolidated Revenue Fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

The proviso is no longer applicable. The section otherwise is law of the country and applicable where legislation has not varied a practice existing at the time of Confederation although, as stated earlier, any extension would, by usage, be preceded by legislation, despite the opening words of section 24 of the FA Act:

**24.** Subject to the British North America Acts, 1867 to 1951, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament.

**105. Responsibility for Collecting and Recording.**—A status of master and servant does not exist between civil servants; from the deputy head to the most junior employee everyone is a servant of the Crown and answerable for all his acts. Durell, in considering responsibility for accounting signatures, expresses the view that:

An officer, of whatever rank, who signs a certificate is personally responsible for the facts certified to, so far as it is his duty to know them or to the extent to which he may reasonably be expected to be aware of them. (*Parliamentary Grants,* p. 374)

That is, the clerk who makes the first entry is responsible for his work; in turn, his superior is answerable for the general state of all accounts under his supervision. Thus a steadily lengthening chain of responsibility is formed until the

Minister himself is reached. He is not personally liable, in law, for the sins and omissions of the staff but he is the one politically answerable to Parliament.

**106.** Unless a collector of revenue is an officer of the Minister of Finance and Receiver General, the Ministers named in taxing statutes have the administrative responsibility for the application given. It is true that section 15 of the FA Act provides that, on the request of a Minister, the Comptroller of the Treasury may

> provide accounting and other services in connection with the collection and accounting of public money for a department.

But when this happens the effect is to make the Comptroller answerable to the ministerial head of the department for the state of the records he maintains and for the services performed by Treasury staff. In no way does such an arrangement substitute the Minister of Finance for the Minister responsible for the working of the department.

**107.** It will, of course, be borne in mind that section 16 of the FA Act vests in the Minister of Finance the exclusive power to designate the bank in which deposits are to be made by departments. The direction is primarily a safekeeping one—to make certain that all public moneys are forthwith brought under control. This special interest of the Minister of Finance (as Receiver General) is one reason why section 73 of the FA Act requires, in certain circumstances, that the Auditor General make a special report to the Minister of Finance rather than to the Minister who might seem to be more directly interested. The section reads:

> **73.** Whenever it appears to the Auditor General that any public money has been improperly retained by any person, he shall forthwith report the circumstances of such cases to the Minister [of Finance].

**108.** In this regard, should a misappropriation take the form of revenue being diverted and misapplied before it is credited to Consolidated Revenue Fund, an audit duty is: (*a*) to report forthwith to the appropriate department, (*b*) to make certain that the Minister of Finance is informed and (*c*) to ascertain whether an endeavour has been made to recover and also if any other officer was associated in the matter or was in any way delinquent.

**109. Accounts Receivable.**—Section 67 of the FA Act requires reviews of administrative practices to ascertain whether procedures in application result in an efficient gathering of the Revenue. A step is to consider the accounts receivable by making an examination of billing and collecting practices. It is a commercial practice, although diminishing in use, to verify balances by direct communication with customers. In some instances this may not be appropriate with respect to public receivables—for example, tax arrears and other obligatory payments for which no specific service is rendered. Generally, departmental concurrence should be sought before debtors are asked to confirm accounts. However, when a particular account is of audit concern, whatever action as may be necessary is to be taken regardless of departmental opinion.

**110.** Auditors will bear in mind that the Crown sometimes enjoys priorities and that statutes of limitations do not run against the Crown. On the other hand,

except where the Crown is specifically entitled to a priority, section 172 of the Bankruptcy Act, c. 14, R.S., declares that the provisions of the Act "bind the Crown in right of Canada or a province".

**111.** *Uncollectable Accounts.*—Several statutes, an example is the legislation respecting seed grain loans to prairie farmers, provide for waivers and adjustments of debts. These have well-established procedures. Reference is now made only to section 23 of the FA Act:

> **23.** (1) The Governor in Council, on the recommendation of the Treasury Board, may, if he considers it in the public interest, delete from the accounts, in whole or in part, any obligation or debt due to Her Majesty or any claim by Her Majesty,
>
> (*a*) that does not exceed five hundred dollars and has been outstanding for five years or more, or
>
> (*b*) that does not exceed one thousand dollars and has been outstanding for ten years or more.
>
> (2) The obligations, debts and claims deleted from the Public Accounts under this section during any year shall be reported in the Public Accounts for that year.

**112.** The text, when in Bill form, provided that the Governor in Council might "extinguish" as well as "delete". When considering the Bill, the Public Accounts Committee felt that this went too far. For example, the Chairman remarked:

> Last year we did not mention at all 'extinguishing'. We meant deleting from the books and it kept the possibility of the Crown collecting at any time. We would delete them from the books but we would not extinguish the obligation of the debtor to pay at any time the Government found there was a possibility to collect. The word 'extinguish' did not come into it.

The text was accordingly amended, a spokesman for the Department of Finance indicating the change was acceptable "on the assumption that there is no continuing obligation to have a department follow up on such accounts". However, the effect of the amendment was to take the teeth out of the section, which is now a 'housekeeping' one.

**113.** In the audit it is not obligatory to continue to review debts and claims after they have been deleted, in proper manner, from operating records. Nor is it necessary that a department delay five or ten years, as the case may be, before seeking parliamentary permission to a write-off of a bad debt. That may be done at any time by means of an item in an Appropriation Act.

**114.** *Accounts in Litigation.*—Parliament and the Crown always respect adjudications of the courts, therefore a judgment disallowing, in whole or in part, a money claim by the Crown is all the authority required to correct accounts of a department. However, sometimes it is necessary to consider what is permissive when the Attorney General of Canada decides to abandon or compromise a claim during the course of litigation. Does that permit a write-off without an authorization by Parliament?

**115.** Audit Office practice is to regard the action of the Attorney General in effecting a compromise as a necessary incident of the conduct of litigation, with

the consequences of the compromise reflected, either tacitly or specifically, in the adjudication of the court. For these reasons, any parliamentary interest is only where it is decided (*a*) not to sue or (*b*) to compromise a judgment award. Where the decision is not to litigate, auditors will distinguish between an indisputable debt (taxes for example) and one for damages, etc. A decision not to sue for tax arrears because the expense would be waste of money is not regarded in the audit as permitting a formal write-off without the consent of Parliament, and like consent is necessary with respect to a judgment debt. On the other hand, when the legal claim may be controversial or the amount problematic and the legal view is that it is not prudent to litigate, the file may be closed without waiting for a parliamentary concurrence.

## Part II—Audit Review of Assessing Practices

**116.** Section 67 of the FA Act requires that the Auditor General form an opinion whether departmental rules and procedures secure an effective check on the assessment of the Revenue.

**117. The Right to Levy.**—There must be parliamentary authorization before a demand may be made for payment. Authorizations to levy are specific but statutes sometimes delegate to the Governor in Council the power to fix tariffs of fees for services to be rendered.

**118.** A resolution of either the Senate or the House does not provide legal authority; there must be joint action and an assent by the Governor General. The point did not relate to a tax, but an English court once stated the invariable position when it declared that:

> The House of Commons is not the Parliament, but only a coordinate and component part of the Parliament. That Sovereign power (Parliament) can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law, or place any one beyond its control. (*Stockdale v. Hansard*)

**119.** *Budget Resolutions.*—The problem of authority most frequently arises in connection with budget resolutions. A budget speech announces that tariff and tax changes will take effect immediately, or on a stated date. If, for example, a rate is to be increased, it is self-evident that the Revenue will suffer if immediate effect is not given. Conversely, business may be dislocated and hardships suffered if early benefits of a proposed reduction are not extended. However, legislation, not policy proposals, is under audit. A resolution approved only by the House is without effect in law. An extract from *Bowles v. Bank of England* explains:

> Does a resolution of the Committee of the House of Commons for Ways and Means, either alone or when adopted by the House, authorize the Crown to levy on the subject an income tax assented to by such resolution but not yet imposed by Act of Parliament? ... this question can, in my opinion, only be answered in the negative. By the statute ... usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom however prolonged or however acquiesced in on the part of the subject can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation,

no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange to find them relied on as justifying the Crown in levying a tax before such a tax is actually imposed by Act of Parliament.

The British Parliament thereupon enacted the Provisional Collection of Taxes Act of 1913 which permits limited application being given to Ways and Means resolutions.

**120.** Canada has no like legislation, therefore our taxing Acts state the date from which new rates take effect. Tax collectors may qualify receipts given so that, should the proposed new rate not be confirmed by legislation, adjustments may be made with taxpayers. But regardless of the text of a receipt, a taxpayer is liable for the tax legally applicable at the time of the transaction. If legislation confirms the new basis, that automatically gives sanction to what a collector has done. Should the Minister of Finance's proposal be varied, the rate applicable is that fixed by the legislation. The fact that the legislative effective date antedates day of assent to the legislation is without significance.

**121.** *The Audit is of the Administrative Process.*—Parliament has not instructed the Auditor General to concern himself with the problems of taxpayers whose recourse, should they have grievances, is to the statutory tribunals and the courts. Nor does the FA Act require that the Auditor General call attention in his Report to the House of Commons to what he may regard as a loophole in a statute, although he may properly draw the matter to the notice of the department concerned. The audit is not of the possible intent of Parliament but of the application given to the text of a statute. An observation worth remembering is:

'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. (*Salomon v. Salomon*)

**122. The Rule of Administrative Consistency.**—The public interest demands that there be impartiality in the assessing and collecting of taxes. Long ago it was firmly established that:

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. (*Partington v. Attorney General*)

This may sometimes seem unfair, especially where some servant of the Crown acts either deliberately or unwittingly and a taxpayer suffers. However, the obligation is to give effect to the law as it reads. To illustrate, some decisions of the courts are now noted.

**123.** *Assessment Erroneously Computed.*—A company accepted a departmental reassessment of income tax liability and paid the amount. Its auditors later observed that notice had not been taken of certain credits to which the company was entitled. The company sought a refund of $66,411 by petition of right. The Crown admitted to the Court that, if the company had objected to the assessment within the sixty days period provided by the Income Tax Act, the Minister would have accepted the company's point of view. However,



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no objection having been taken within the period, the assessment made was binding and could not now be contested. The decision of the Court is summarized in the headnote:

> That notwithstanding the fact that the suppliant had paid a substantial amount of taxes, which on a proper construction of the Act it was not liable to pay, it could not now recover such taxes because of its failure to object to and appeal from the reassessment within the time limited by section 53. (*Subsidiaries Holding Company v. The Queen*)

**124.** *A Ministerial Promise.*—The Government was suing a number of breweries for taxes. Before trial, a lump sum settlement was arranged with one company and the amount paid. Subsequently it sought a refund of $268,000 because (*a*) another brewery had succeeded in part and (*b*) the Minister had written a letter which included:

> We do not desire to collect any taxes not properly due the Crown, and if it can be shown that any overpayment has been made by the company in question, or if it is established that they were not liable for any tax that they may have paid, you can assure them that refund will be made.

Part of the headnote to the decision of the Supreme Court of Canada reads:

> The Minister's said letter could not be a basis for claim by appellant. The moneys paid by appellant became part of the Consolidated Revenue Fund of Canada and it would require a statute, or something of like force, to clothe the Minister of a department with authority to agree to repay to a subject moneys voluntarily paid by the subject in settlement of an action brought by the Crown for payment of taxes alleged to have become due and payable. The Minister's assurance in said letter, once it was determined that it was not confirmation of a condition to the original settlement, could not be sued upon as an independent agreement, because it was not competent for the Minister to fetter the future executive action of the Government. (*Walkerville Brewery v. The King*)

**125.** *Ruling by Senior Administrative Officer.*—A lawyer, on behalf of a businessman, consulted the Commissioner of Taxation on the application of a section of the Income Tax Act. He was given a verbal ruling but the department later gave a different application to the section. During the trial it was not contested that there had been conversations and a ruling; nevertheless, the Crown won the case, an extract from the judgment being:

> I think it is quite clear that the "ruling" said to have been made in this case, was made without authority and was not in any way binding upon the Crown. There is nothing in the section itself which confers any sort of discretionary powers on the Minister or his officials. Parliament has said that under certain circumstances certain things are deemed to be dividends and manifestly the Commissioner of Taxation had no power to declare otherwise or to settle the limit of taxation thereunder, other than according to the statute itself. (*Woon v. Minister of National Revenue*)

**126.** *Expressed Opinion of an Assessor.*—A golf club was organized in such a way that it might, in law, be a non-profit social club or one subject to income tax. At the close of the first year ending with a profit, a departmental assessor was interviewed and his opinion was to the effect that the club was not subject to tax, provided a resolution in certain form was adopted at a general meeting. This was done. Several years later the club was retroactively assessed, with penalties. It pled the "understanding" but was unsuccessful, the Court deciding that "the Crown is not bound by the errors or omissions of its servants". (*Minister of National Revenue v. Lakeview Golf Club*)

**127.** *Failure of Inspectors to Comment.*—A statute imposing a transfer of shares tax required stockbrokers to collect the tax by affixing stamps to defined documents. Regulations stipulated that certain books of account be kept. A firm of stockbrokers failed to conform with these requirements and was sued for $51,487, representing tax on six years' transactions. Among other defences was the plea that departmental officers had more than once visited the firm's office but had never objected to the accounting procedure not conforming to the regulations. This was rejected by the court:

> It is well established that the defence of estoppel cannot be invoked against the Crown, nor can the acts of the Crown's servants or agents bind it by estoppel. The interests of the Crown are certain and permanent and they must not suffer by the misconduct or negligence of its servants. (*Atty. Gen. v. Fields & Co.*)

**128.** *Property Stolen in Custom-house.*—Glazier diamonds were imported and were in a custom-house for examination They were stolen, nevertheless duty of $465 was demanded and paid. The action was to recover the value of the goods plus duty paid but the petitioner was unsuccessful, the court taking the view that the legal obligation was on the importer to make the goods available for inspection, so the goods were in the building for that purpose and not for storage:

> The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. (*Corse v. The Queen*)

**129.** *No Immunity Results from Failure to Tax.*—It is improbable that an auditor will ever have to consider the legal position arising out of a protracted practice of regarding a particular person as not liable to a tax when, in fact, he has always been subject to the levy. However, it may be useful to have a reference. Many years ago the British Parliament imposed an Irish tax called "grand jury cess" with collection by and for the benefit of municipal authorities. No demand was made on Trinity College, Dublin, until the 1890s when the City made a levy. In true Irish fashion it was fought through the courts to the House of Lords where it was accepted that the position in law was:

> if the plain words of an Act of Parliament imposed a tax, no amount of omission to charge that tax or to insist upon it by the proper executive officer could control or cut down or override the force of the Act of Parliament itself. (*Dublin Corporation v. Trinity College*)

**130. The Power to Remit.**—The illustrations just given may seem harsh and one-sided, but auditors bear in mind that a duty on public officers is to apply tax legislation to every person falling within its terms and, in turn, it is a duty of citizenship to pay what is due. Both must obey the law, otherwise undemocratic and discriminatory practices would take root and flourish.

**131.** Parliament has long recognized that strict legality should be tempered with equity and so has delegated to the Executive a power to extend relief in appropriate circumstances. This delegation is to be found in several statutes, but the most general is that set out in section 22 of the FA Act, the opening words of which are:

> **22.** (1) The Governor in Council, on the recommendation of the Treasury Board, whenever he considers it in the public interest, may remit any tax, fee or penalty.

An auditor need not concern himself with the question: What does "in the public interest" include? Parliament has vested in the Governor in Council a discretion to decide in all circumstances save one:

> (6) No tax paid to Her Majesty on any goods shall be remitted by reason only that after the payment of the tax and after release from the control of customs or excise officers, the goods were lost or destroyed.

**132.** A remission may be total or partial; it may be conditional or unconditional and relief may be authorized before liability to pay arises. Therefore, a specific amount need not be named in the order in council, nor is it necessary that an assessment (later to be deleted) be set up in the department's accounts. However, the section may not be relied on to grant a general exemption from tax liability—that would be an invasion of the rights of Parliament—relief may be granted only in a "particular case or class of cases".



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**133.** Section 22 has a definition subsection which is sometimes of audit concern so is quoted:

(10) In this section "tax" includes any tax, impost, duty or toll payable to Her Majesty, imposed or authorized to be imposed by any Act of Parliament, and "penalty" includes any forfeiture or pecuniary penalty imposed or authorized to be imposed by any Act of Parliament for any contravention of the laws relating to the collection of the revenue, or to the management of any public work producing toll or revenue, notwithstanding that part of such forfeiture or penalty is payable to the informer or prosecutor, or to any other person.

**134.** *Prerogative Remissions.*—The pardoning power is recited in the 1947 Letters Patent (printed in Volume VI of the Revised Statutes) and is exercisable only after conviction. In capital cases the Governor General acts on the advice of the Cabinet but in all others on "the advice of one, at least, of his Ministers"—no order in council is then necessary. The audit interest is in fines and penalties which accrue to Consolidated Revenue Fund. For example, section 626 of the Criminal Code entitles the Receiver General to receive fines only when (*a*) the case involved a breach of a revenue law of Canada or (*b*) a breach of duty or malfeasance in office by an employee of the Government, or (*c*) the proceedings were instituted and costs of prosecution borne by the Government of Canada.

## Part III—Audit Review of Collecting Practices

**135.** The FA Act stipulates that the Auditor General certify a Revenue statement and report to the House of Commons any case observed where there has been a failure to collect or receive money belonging to Canada. This involves a review of administrative practices from the viewpoints of efficiency and honesty. The role of the Auditor General is that of a fact-finder, evaluating practices from the viewpoint of results. A tax must be paid, but how the department proceeds to collect is something regulated by administrative experience and circumstances.

**136.** An essential is that the official interest be not subordinated to the convenience of the taxpayer. The Minister of Finance may have balances in the banks running into hundreds of millions while the taxpayer may have to borrow to pay his taxes, but the right of the Crown comes first. To illustrate by using an Australian decision: A statute provided that goods might, in certain circumstances, be released from customs by the taking of a bond, guarantee or cash deposit. An importer claimed to enjoy a discretion, but the court decided otherwise:

There is no reason for giving the choice to the importer, because strictly he should pay cash and the whole question of security is a relaxation in his favour. It would be absurd that he should have the choice of any one of these three forms. (*Commonwealth v. Melbourne Harbour Trust*)

**137. The Collecting Process.**—Strictly regarded, the duty is to demand payment in legal tender but it is generally accepted that a department may, in its discretion, take cheques. It is also expected that payment is made as soon as the liability matures; however, while some Minister is answerable to Parliament if that is not enforced, it is now recognized that, where expedient and not prohibited, he may make exceptions where of opinion that it will be of ultimate benefit to the Revenue. A British case will be used to illustrate. In 1933 the Public Accounts

Committee considered the action of the Board of Inland Revenue in taking shares of a company in financial difficulties, in the hope that, given time, the amount due for taxes would be realized. The Committee expressed doubt as to the wisdom of the practice, but after affirming "the principle that tax liabilities should be discharged by payment in cash", went no further than to declare that cases like that before it "should be regarded as altogether exceptional". In passing, the Canadian Minister of National Revenue has statutory support when he takes security for an unpaid income tax assessment, because section 116(4) of the Income Tax Act, c. 148, R.S., reads:

(4) The Minister may, if he considers it advisable in a particular case, accept security for payment of taxes by way of mortgage or other charge of any kind whatsoever on property of the taxpayer or any other person or by way of guarantee from other persons.

**138.** *Audit Interest in Time Extensions.*—Although recognized that it is within the competence of a Minister in particular circumstances to allow an extension of time for payment (the Minister of National Revenue cannot in certain cases—see section 235 of the Customs Act, c. 58, R.S., for an example), it continues to be expected that audit notice be taken of any arrangement that is so exceptional or unusual as to merit parliamentary consideration.

**139.** The Crown steps down from its sovereign status and becomes a commercial collector when a time extension is granted. Therefore the adequacy of the amount taken as a down payment may be of parliamentary interest, as well as the length of time granted. The reasons of the department are to be treated with respect and judged by the circumstances existing when the extension was granted. The auditor will also note what administrative safeguards exist against partiality. For example, a delay approved by Executive order or minute, or by a Minister, when based on reports by his officers, is obviously better safeguarded than one directly granted by the person in contact with the debtor. When the examination leads to the conclusion that a justifiable decision was reached, the transaction may be passed without audit observation.

**140. The Exercise of Statutory Discretion.**—In some instances it happens that a levy may be assessed under alternative headings. The selection, as a rule, is a matter to be decided by the department:

Where there is a clear alternative given to the Crown to tax under one head or another, the right of choice belongs to the Crown. (*Halsbury's Statutes of England,* 2nd ed., vol. 31, p. 541)

The writer, of course, was discussing the situation between department and taxpayer, but there is no audit obligation to question, for example, techniques and decisions of customs appraisers so long as there is no reason to suspect fraud or partiality. There is an obligation to establish whether section 50 of the Customs Act was strictly applied:

**50.** If an article is enumerated in the tariff under two or more names or descriptions, and there is a difference of duty, the highest duty provided shall be charged and collected thereon.

**141.** A statutory discretion properly exercised is final. By way of illustration, section 37 of the Excise Tax Act, c. 100, R.S., provides that when goods are sold at a price

> that in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister has the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

In *The King v. Noxzema Chemical Company of Canada,* the Supreme Court of Canada had to consider the section and a conclusion reached was that the section "confers upon the Minister an administrative duty which he exercised and as to which there is no appeal".

**142. Recovering Cost of Services Rendered.**—The FA Act includes a section which is applicable to all departments of government. It reads:

> **18.** Where a service is provided by Her Majesty to any person and the Governor in Council is of opinion that the whole or part of the cost of the service should be borne by the person to whom it is provided, the Governor in Council may, subject to the provisions of any Act relating to that service, by regulation prescribe the fee that may be charged for the service.

The purpose, of course, is to vest in the Governor in Council the authority to impose charges for services rendered for the special benefit of some person or group. When that is done, regulations made are binding on departments.

**143.** An audit problem in the application of this section may be: What is the obligation when no action is taken by the Governor in Council? The Audit Office view is that use of the section is a matter wholly within the discretion of the Governor in Council. However, that does not preclude the Auditor General from drawing attention to possible sources of income, especially where there is an obligation on the Crown to safeguard against particular persons being, in effect, subsidized. In other words, audit interest is less in non-application of section 18 to a service where the public generally benefit than where some particular individual is a special beneficiary. The point will be illustrated by reference to an old court decision (rendered in the days of sailing ships and so overlooking the terms of the Canada Shipping Act). A sailing ship in distress applied for the assistance of a British Government steam vessel. Later a dispute arose as to what costs the owners must recoup. The decision was that they must pay all costs because:

> It is a mistake to suppose that the public force of this country is to be employed gratuitously in the service of private individuals merely to save them from expense. The government steam vessels are kept for the public service, and the officers in command cannot employ them in the service of individuals and thus risk the public property without authority, or an indemnity for all expenses and damage. (*"The Lustre"*)

**144. Revenue Payments by Cheque.**—An immediate audit interest, whenever cheques are accepted, is whether administrative practice invariably requires that the cheques are (*a*) made payable to the Receiver General and (*b*) promptly deposited. Should it be observed that cheques are being held, there is an irregularity to report, unless the circumstances of the transaction are such that the action taken is necessary in the public interest. Of course, there are instances where, by regulations, cheques are directed to be held, an example being those that accompany tenders for works or supplies.

**145.** *Certified Cheques.*—The fact that a cheque has been certified by a bank is no justification for a delay in depositing to the credit of the Receiver General. The effect of a bank certifying is: If the drawer has it certified before delivery, he and the bank join in the obligation to pay; while if the department has it certified after delivery, the bank becomes answerable for the amount. In these days of strong banks, the distinction is without significance, but until deposited the Receiver General cannot use the money.

**146.** *Postdated Cheques.*—The acceptance of a postdated cheque is simply a means adopted to expedite collection and to remove any dispute as to liability. It neither relieves the debtor of his liability nor bars the Crown from taking other action currently to collect the sum due.

**147.** *Delays in Depositing.*—If a cheque is held because it is feared the issue of a receipt or deposit of the money tendered will impair the exercise of an administrative discretion, audit notice is taken unless the holding is on the advice of the law officers.

**148.** Litigation that once involved the City of Calgary was unusual but the circumstances could arise again so the outcome is noted. It was the practice of the City to note on tax notices that cheques "accepted by a bank" would be taken. On 8 October a taxpayer went to a trust company where he had a deposit account and it certified his cheque for $500. This was not the equivalent of a bank acceptance but an officer of the City took the cheque on the same day. Being a rush period, the cheque was not deposited in the City's bank until the 14th. It so happened that on the 13th the trust company had gone into receivership and in due course the cheque was returned to the City. The taxpayer contended the fault was not his and that he was entitled to a tax credit for $500. However, the courts decided that the taxes had not been paid and that the City should not suffer because of the unauthorized act of its employee. (*Collings v. City of Calgary*)

**149.** *N.S.F. Cheques.*—When a cheque is returned by a bank marked "N.S.F." that voids any receipt previously given. To illustrate, in November 1950 a man insured under the Veterans Insurance Act, c. 279, R.S., with premiums payable monthly but subject to the usual thirty days of grace. During 1951 the insured failed one month to pay in time but the department did not invalidate the policy because he paid up shortly after. However, a subsequent default in payment resulted in litigation: On 9 January 1952 a cheque dated 26 December was received for the premium that matured on 30 November. The cheque was deposited forthwith and an official receipt mailed although the period of grace had expired. The cheque was drawn on a bank outside of Ottawa and it was some days later before it was returned marked "N.S.F.", whereupon the insured was at once notified. On 7 February a bank money order was received and on the 10th the insured died. The Crown contended that the policy had lapsed as of 30 November. Against that view it was argued: (*a*) the department had acted differently on a previous occasion, (*b*) the bank account had always been in funds during the December-January period save for a period of a few days, and

(*c*) the Crown was bound by the giving of an official receipt. There were several other pleas but so far as the foregoing are concerned it was decided:

All the moneys due under this policy were to be paid at Ottawa. It was the insured's obligation to see that he had the necessary funds to cover the cheque when it was presented to his Bank for payment. I do not believe that the receipt and acceptance of the cheque or the fact that an official receipt was issued and the amount of the cheque credited to his account are sufficient to establish that it was accepted as absolute payment of the premium. It lacked the essential prerequisite, the payment of money, the cheque having been dishonoured. (*Millet v. The Queen*)

**150. "Under Protest" Notices.**—In the audit it is to be established, when a person protests liability, that moneys received from him were nevertheless deposited as public money. The utility of the notice—that payment is made under protest—is to the taxpayer in proceedings against the Crown, because the Crown has already indicated its right to the money.

**151.** Sometimes when an amount is in dispute one side tries to finalize the position by sending a cheque on which is typed or written, either on the face or back, "in full and final settlement" or words of like meaning. It is a question of law what the consequence may be, but ordinarily deposit of such a cheque will not affect the rights of the Crown. The illustration now used did not involve the Crown. A property owner arranged that a company blacktop his driveway and put in new curbstones, etc. The work was done and a bill for £259 presented. The owner contested about £15 worth of the work performed so forthwith paid £125 only on account. Some time later he sent another cheque for £75 across the back of which he typed the words: "In full and final settlement of account". The cheque was endorsed and cashed. When the company sued for the balance the defence was the wording on the back of the cheque. However, the company succeeded. One judge pointed out that the point in issue was whether it was reasonable to assume that the company had agreed to forgo £59 when only £15 was in dispute. Another went further: "Words of this kind on the back of a cheque cannot be made a trap for the unwary". (*Neuchatel Asphalt Co. v. Barnett.*) W. H. D. Winder, in referring to this decision in an article in *The Accountant* (18 January 1958, p. 56), points out that: "The signature was operative as an endorsement only". This is why, in nearly every instance, the endorsing and deposit of cheques are ordinarily matters of office routine, referable only to relationships with the cashing banks. (*Colvin v. Nelson Land Board*)

**152. Adjustments Because of a Mistake.**—A problem sometimes presents itself when an error of a civil servant results in more money being received than is due. What is permissive? It is generally accepted that money paid under a mistake of fact should be returned. Consequently, when both parties agree as to the amount of the overpayment an adjustment may be made out of Revenue to the extent that Executive regulations permit. However, if the mistake is founded on a misinterpretation of the law, he who pays is often unsuccessful in suits to recover. The dividing line between these 'mistakes' is sometimes a thin one, so an auditor should expect to find an opinion of the law officers in unusual cases. Two English decisions are now given to illustrate.

**153.** *Cashier's Mistake.*—In England, pari-mutuel betting is operated by a statutory board having power to make rules, one being that holders of winning tickets should examine payments before leaving the wicket "as mistakes cannot be rectified later". A bettor won £42 but the cashier paid out £202 (£5 notes instead of ones). Offhand, it would seem reasonable that the rule quoted above be applicable to both parties; however, the court ordered repayment to the board because of the common law right to recover money paid out under a mistake of fact. (*Racecourse Betting Control Board v. Mount*)

**154.** *A Promise to Refund.*—A company discussed with a United Kingdom department whether one of its products was subject to purchase tax. It was mutually agreed to take a test case to the courts. Before judgment was rendered, the company paid the department £1,919, representing purchase tax on sales to date. The decision was in favour of the company, whereupon it applied for a refund of the £1,919, but the department refused on the ground that payment had been made in mistake of law and, therefore, was not recoverable. Later, in reply to a question in the House of Lords, the Lord Chancellor gave another:

> The real reason for the Commissioners' refusal was, I am told, that they thought that because in many cases the purchasers of the articles (who had paid the tax) could not be traced, a part at any rate of the monies repaid to the company would be retained by it as a windfall. (House of Lords Reports, 30 June 1949)

The company again litigated, the same judge hearing the argument. He dubbed the payment as one "incautiously, and to some extent inexplicably made" but decided that, in the special circumstances of the case, there existed, by implication, an agreement to refund if the decision went a certain way, therefore the payment was not one within the meaning of a mistake in law. (*Sebel Products v. Commissioners of Customs and Excise*). A refund was then made out of revenue by deduction from an amount due from the company in respect of a later tax period. This decision resulted in a Treasury directive that departments exercise discretion in relying on the 'mistake in law' defence to retain moneys paid because: (*a*) departments are emanations of the Crown which is the source and fountain of justice, and (*b*) the public service should set the highest possible example to taxpayers.

**155.** It would seem that there is no absolute prohibition against an adjustment being made where a right to recover may be barred by the maxim 'ignorance of the law is no excuse'. However, where in such circumstances an adjustment is made, an audit duty is to establish that the amount was a permissive charge to a vote.

**156.** Where made within the fiscal year in which it was received, no audit exception is taken to a refund out of Revenue. The audit problem more likely to arise is when a refund is made in a year subsequent to that in which received and no enactment appears to regulate. Because each year's Revenue accounts are presented to the House of Commons on a cash basis, it is the Office view that the House would expect to be informed were such a refund not recorded as an expenditure. Of course, a different situation exists where there is legislation directly applicable, an example being section 57 of the Income Tax Act, c.148, R.S.

**157. Exaction of Revenue Penalties.**—Some statutes provide that the taxpayer shall be liable to a penalty if an obligation is not discharged by a certain time. The question can arise: Has a department the power to waive? When the purpose of the Act is solely that of raising money, a presumption is that the inclusion of a penalty provision is to facilitate and expedite collection of the tax, and in that event an auditor may assume that a department enjoys a measure of discretion. Unless the statute permits, the department may not declare a general

waiver, but in a suitable set of circumstances it may decide that the penalty provision will not be applied in a particular case. For that decision, the Minister for the department is answerable to Parliament, with the audit duty that of establishing whether adequate administrative safeguards exist against partiality influencing the decision not to collect a penalty.

**158.** An associated problem sometimes is when a department assesses a penalty but does not exact the maximum permissive. Should the words 'not exceeding' form part of the penalty enactment, discretion is exercisable in fixing the amount. In an English case which involved a practising accountant (*Inland Revenue Commissioners v. Elcock*) it was observed that where a taxpayer wilfully flouted requirements, that was something more serious than a failure to comply due to an act of negligence or carelessness, and justified the imposition of the maximum penalty.

**159.** *Establishing Date of Default.*—In audit tests to establish whether statutory penalties for non-payment by a date certain were applied, it will be regarded that tender of a certified cheque is the same as money. Where it is customary to accept ordinary cheques, the date of mailing or physical delivery may be regarded as the date of payment (providing the cheque is not subsequently rejected by the bank on which it is drawn) because section 39 of the Post Office Act reads:

> Subject to the provisions of this Act and the regulations respecting undeliverable mail, mailable matter becomes the property of the person to whom it is addressed when it is deposited in a post office.

**160. Conscience Money.**—Ordinarily such a receipt is small and no effort is made to trace the source. However, it has happened that senders subsequently sought credit. For example, a man, feeling that the income tax return prepared by his partner was incorrect, sent anonymously an amount representing his share of what he considered was the sum payable. Later the income tax authority reassessed the partnership and added penalties, whereupon the partner claimed credit for the sum he had sent and it was allowed after the payment was traced in the Government's accounts. The illustration is not Canadian.

**161. Payments to Informers.**—Various revenue statutes take notice of the possible use of informers—so also does section 22 (10) of the FA Act. Reference is now made to one point only: unless the text of the statute clearly permits, no firm commitment may be made as to the amount an informer will be paid. Section 123 of the Excise Act, c.99, R.S., for example, authorizes the Governor in Council to make regulations providing for 'awards', which is something different from making a promise to pay.

**162.** To illustrate the foregoing, in 1932 the courts of Scotland considered a case involving £30,000 claimed by an informer on the ground that the inspector of taxes at Glasgow, having been duly authorized, had agreed to pay him 10% of the amount collected from a distillery on account of past tax evasions. The Act in question permitted the Commissioners of Inland Revenue, at their discretion,

to "reward any person who informs them of any offence against any Act relating to inland revenue". The department denied any promise to pay but admitted that it had given the claimant £250 reward for information he had provided. In the trial judgment is to be found:

> It is my opinion it is open to doubt whether it is not contrary to public policy that Government departments should make bargains with persons who say they have knowledge of alleged frauds as to the terms upon which such knowledge is to be communicated to the authorities and it appears to me that the power to make such a bargain can be conferred upon Government departments only by express and clear enactments ...

On appeal, one of the judges noted this with approval, adding that:

> What the Act seems to authorise is the giving of a discretionary award for a *fait accompli*—a service rendered—not a making of bargains as to contingent future awards. (*Riach v. Lord Advocate*)

## Part IV—Miscellaneous

**163. Extra Earnings and Gifts to Public Employees.**—Outside his hours of duty, a civil servant may, subject to Executive rules, add to his income by performing services for others. However, during office hours he is expected to perform whatever duties the head of his department may require and extra compensation may be paid to him only when permitted by law. The control is ordinarily exercised by prohibiting charges to votes, but that, naturally, is ineffective when, in association with performance of official duties, a service was performed for a commercial firm, another government, etc., and the cheque issued by it. Any sum thus derived is 'public money' whenever the recipient continues to receive the salary of his position.

**164.** *Gifts to Civil Servants.*—Section 92 of the FA Act reads, in part:

> **92.** Every officer or person acting in any office or employment connected with the collection, management or disbursement of public money who
>
> (*f*) demands or accepts or attempts to collect, directly or indirectly, as payment or gift or otherwise, any sum of money, or other thing of value, for the compromise, adjustment or settlement of any charge or complaint for any violation or alleged violation of law,
>
> is guilty of an indictable offence, and is liable on conviction to a fine not exceeding five hundred dollars, and to imprisonment for any term not exceeding five years.

The application of this provision is, of course, a matter for the lawyers; what is now noted is the Crown's claim to the gift. The illustration now used is an unusual one; moreover, it involved a soldier; but it states a rule of law applicable alike to civil servants and members of the Forces. During World War II a sergeant stationed in Egypt was paid sums ranging from £1,000 to £4,000 in return for his sitting (in uniform) beside the driver of a lorry as it traversed a city. The purpose was to minimize the risk of the lorry being stopped, searched and its contents seized. This being repeated many times, he accumulated a large bank account which the British Government seized. The soldier carried his suit to the court of last resort but failed, it being held that:

> any official position, whether marked by a uniform or not, which enabled the holder to earn money by its use gave his master a right to receive the money so earned, even though it was earned by a criminal act. (*Reading v. Atty. General*)

**165.** *Honoraria Payments by Other Authorities to Public Employees.*—Money may pass through the Consolidated Revenue Fund to the end that civil servants receive the equivalent of an *ex gratia* payment for services of a special nature performed in the course of duty. An illustration was the distribution of over $20,000 after World War I among officers of the Department of Finance. Sir Thomas White, wartime Minister of Finance, describes in *The Story of Canada's War Finance* the special tasks performed in handling over 2,000 tons of gold for the Bank of England and the British Government. No agreement obligated the British authorities to pay more than out-of-pocket expenses but in due course an amount was sent to be distributed in such manner and to such persons as the Canadian Government might decide. The sum was treated as non-public money, the role of the Government of Canada being regarded as that of an agent acting for another government. In cases of this type, any money paid to the Receiver General after performance of services of exceptional and special nature is usually treated as money paid to Canada for a special purpose under section 20 of the FA Act. The position is, of course, different when the Government 'hires-out' the services of employees, or a sum is received in advance; in that event any money received is subject to appropriation by Parliament. (*China Navigation Co. v. Atty. General*)

**166.** *Salvage Moneys.*—A special position exists with respect to salvage claims. It has long been accepted in England that crews of naval vessels (an exception has been a commanding officer) may demand shares from owners of ships salvaged. Canadian practice is now regulated by section 211 of the National Defence Act, c. 184, R.S. This section is applicable to the Navy and R.C.A.F. and permits crews (including commanders) to claim salvage whenever the Minister of National Defence consents. Where successful, the court makes the distribution but, in the event that the Minister arranges a settlement, distribution of the amount is to be "in such manner as the Governor in Council may prescribe".

**167. Public Property Revenue Transactions.**—Because the listing would be lengthy, amendments are frequently made and the subject is reviewed in the chapter on Public Property, no reference is now made to the various statutes and regulations controlling sales of public property. Here, it will suffice to note that a generally accepted rule is that, without Executive or statutory sanction, no department should dispose of public property at a price which is not the best that can be obtained from the general public. (British Public Accounts Committee Reports, 1924.)

**168.** Occasionally it is observed in the course of audit that a department has exchanged a piece of Crown real estate for land owned by some other public authority or person. The concurrence of the Governor in Council is a requisite but the real audit problem is whether the 'sale' value should be recorded as Revenue and the 'purchase' price as Expenditure. The Office view is that where no cash is paid by either party, the transaction need not be reflected in the published Accounts (*see* paragraph 629); on the other hand, if money is payable

by either party, the Crown land should be given a value and recorded as Revenue with an appropriate charge made to a vote for the cost of land transferred to the Crown.

**169.** An associated problem is when public property is improved by a tenant under the terms of a lease. An illustration is to be found in paragraph 65 of the 1944 Audit Report. A company leased water lots with respect to which it was to make capital improvements, the outlays being deductible from rentals payable. The Auditor General drew attention to over $28,000 having been thus spent on public property without Parliament voting money for the purpose. Without waiting for any review by the Public Accounts Committee, the department concerned sought and obtained a vote to credit Revenue with the amount and, in turn, appropriate a like amount for work performed.

**170. Premium, Discount and Exchange Account.**—Since October 1950, the current exchange value of the Canadian dollar is determined by market conditions of supply and demand. The FA Act stipulates that the accounts of Canada be kept in Canadian currency, therefore foreign holdings and current liabilities in other currencies are annually revalued on the basis of official market rates for the Canadian dollar. The net profit or loss in a year on exchange transactions is reflected in the Premium, Discount and Exchange account. If at the end of a year there has been a net credit, it is reported as Revenue, conversely as Expenditure, in which case it is an extra-statutory outlay. To a degree, the balance represents bookkeeping adjustments and for that reason no audit query is raised as to authority when the outcome of the year results in an 'expenditure'.

**171.** When a department independently acquires currency of some country for the purposes of an imprest account, revolving fund, or to make a payment, the charge is to the vote that will reflect disbursements. Normally, such a transaction does not involve entries in the Premium, Discount and Exchange account of the Department of Finance; however, when a department has a substantial balance at credit in a foreign currency account on 31 March, auditors will expect that the balance is adjusted to the official rate quoted on that date by the Bank of Canada and a vote credited or charged, as the case may be.

**172.** Technically the Receiver General, actually the Department of Finance, maintains balances in various countries for the current and prospective needs of the Department and also to finance transactions of other departments. All exchange profits or losses resulting from the operation of these accounts (including those resulting from an averaging of rates in transfers to other departments) are reflected in the Premium, Discount and Exchange account. So also are adjustments made on 31 March to the day's rates of exchange on assets and current liabilities receivable or payable in currencies of other countries.

**173.** At one time it was the practice to adjust annually the liability with respect to issues of long-term debt payable in sterling or U.S. dollars, but this is not now done. (*See* paragraph 640.)

**174.** When a department receives a tax payment in other than Canadian dollars, any exchange profit should be reported as Premium, Discount and Exchange because the right is to collect the par value of the Canadian dollar. Parliament has less interest when a side-profit is made in a commercial settlement. Strictly speaking, should any loss be sustained on conversion of funds received in settlement of any account, the department should demand from the sender the amount still owing but, if the sum involved is small, audit notice need not be taken should decision be to absorb it, even though a small vote administered by the Department of Finance provides for such charges.

## The Expenditure Audit

**175. Introductory Note.**—Parliamentary control of the public purse is exercised by determining how the revenue of the country may be spent and ends with the voting of Supply. The influence of the House extends, however, into the spending process because those who spend must make an accounting and the Auditor General is to examine the accounts to ascertain whether expenditures conformed with the grants made by Parliament. Specifically, section 70 of the FA Act requires that he call attention to every case observed in the course of audit where:

(i) any appropriation was exceeded or was applied to a purpose or in a manner not authorized by Parliament, or

(ii) an expenditure was not authorized or was not properly vouched or certified.

**176.** At one time every payment was scrutinized in the audit. That is no longer done because, among other reasons, the Comptroller of the Treasury, acting independently of departments, necessarily reviews every proposed outlay before payment is made. Chubb concisely describes the end-purpose of the parliamentary audit in these words:

Since the main aim of the audit is not to reveal all faults, but to reveal enough faults to deter those who handle money and accounts from making mistakes and acting improperly, full audit is neither necessary nor useful. (*The Control of Public Expenditure,* p. 179)

**177.** An appropriation audit is conducted in such a manner as will determine the application given to votes and the respect in which established usages and conventions were held by departments; some of these are statutory but the greater number are those which over the years have become recognized and accepted by parliamentarians and the Crown. A consequence is that many vote texts consist of a few key words; that is why Jennings says that a Commonwealth auditor general

might not be unfittingly described as the grand protector of red tape. He insists that due formality be observed in everything; not because red tape is attractive in itself, but because it is merely a term of abuse for proper control. . . . The present system of control has been developed not by the mere accretion of formality to formality, but as a result of a long experience of abuses. (*Parliament,* 2nd ed., p. 323)

**178.** An authorization to spend may take the form of (*a*) a vote good for the fiscal year and identified with a purpose listed in the schedule of an Appropriation Act, or (*b*) a power to spend that is given in a statute to attain certain objectives without fiscal year time limit. The Crown enjoys some latitude in selecting objects for the purposes of the first, but little with respect to the second. The quotation now following concerns an Appropriation Act of the Quebec Legislature but it is equally applicable to one of the Parliament of Canada:

The supplies are granted to the Crown for the public service by the legislature, but the expenditure is left to the discretion of the executive, which decides on the propriety of every transaction requiring the payment of public moneys, and the only limitation imposed upon the executive by the constitution is that the disposition of the moneys must be in accordance with the votes. The executive is not bound to spend the moneys voted by the Legislative Assembly and granted by the legislature, but every expenditure of such moneys must be made on its authority. The Legislative Assembly, which votes the supplies, has, it is true, a control over the expenditure, which is exercised through the committee on public accounts, but that control is restricted to enquiring if the moneys granted have been spent in accordance with the votes, and it does not encroach on the functions and authority of the executive. (*R. v. Waterous Engine Works Company*)

**179.** Textbook writers trace through the centuries the development of parliamentary financial control, but decisions of interest in the appropriation audit do not, as a rule, antedate the establishing of a public accounts committee in England in 1862 nor, in Canada, the finance committees of the 1850 era headed by William Lyon Mackenzie.

**180.** The British format of votes differs from ours and their departments enjoy a greater degree of independence in the spending process than is tolerated by Canadian practice, which frequently requires Executive concurrence before action; however, reports of the British Public Accounts Committee are of greater utility than are those of the like Canadian committee. The reason is that attention in England has always centred less on the specific flaw in the spending process than on the procedure that might be adopted to avoid recurrence. The practice of the British Committee is that:

(i) Its reports should not be merely routine work but should be based on sound financial principles.

(ii) The language used in the reports should be restrained, but firm and judicial though not censorious.

(iii) It should also note what action has been taken on its previous reports. (Lal's *The Indian Parliament*, p. 159.)

**181.** A review of Canadian records discloses that it is a relatively new practice for our Public Accounts Committee to review the annual report of the Auditor General. This was occasionally done by a sub-committee in the period between 1880 and World War I, but the real task of the Committee was investigating charges of expenditure abuses made by Members of Parliament. All witnesses were examined under oath and committee reports took the form of transmittals of evidence. Rarely were recommendations associated therewith, consequently one has often to conjecture what was the consensus of the Committee. This is a reason why Guide quotations are more frequently from the records of the British Public Accounts Committee.

## Part I—The Appropriating Process

**182.** British practice is to regard any change in the form or components of an Estimate item as something to be settled with the Public Accounts Committee before use. The purpose is to make certain that the reporting of resulting expenditures will be in a form satisfactory to the Committee. A like usage has never

taken root in Canada; instead, it has always been regarded that the Government, as suppliant for Supply, may classify its needs in such manner as it considers most appropriate. When the present style of Estimates items was introduced in 1938, the Minister of Finance explained the changes to the House when tabling the book. Subsequent to World War II, the Details section of the book was materially enlarged and there was prior discussion with the Public Accounts Committee, but section 29 of the FA Act leaves to Treasury Board the approving of allotments which may be:

> in the form detailed in the estimates submitted to Parliament for such appropriation or item, or in such other form as the Board may prescribe . . .

**183. Preparation of Estimates.**—Practice normally is that the Minister of Finance, as Chairman of the Treasury Board, directs departments to submit by a named date, usually in November, their estimates of requirements for the ensuing fiscal year. Departments make submissions over the signatures of Ministers and these are supported by such documentation as Treasury Board may request. The Board may reduce or reject any proposal, or refer it to the Cabinet for instructions. In due course it reports to the Cabinet on the Estimates as a whole and that body settles amounts to be recommended to the House of Commons.

**184.** Section 54 of the B.N.A. Act requires that the Governor General make the recommendation and the Message reads:

> The Governor General transmits to the House of Commons, Estimates of sums required for the service of Canada for the year ending on the 31st March, 19..... and, in accordance with the provisions of the British North America Act, 1867, the Governor General recommends these Estimates to the House of Commons.

The purpose of this practice is to bar everyone, save the Government collectively, from initiating charges on Consolidated Revenue Fund:

> There had been in the early history of constitutional government in Canada notorious scandals arising out of the appropriation of public funds upon resolutions brought by private members. In many cases Ministers had evaded liability for corruptly awarding out of public funds pensions and bribes to their friends by getting private members to introduce the necessary resolutions. As a consequence the Union Act of 1840 made provision for the definite expression in the written Constitution of the usage that there shall be no appropriation of public funds save upon the resolution of a responsible Minister, after a request has been made by the Representative of the Crown upon the advice of the Minister. (Minty, *Constitutional Laws of the British Empire,* pp. 131-2)

However, an auditor will err should he read into the text of the Governor General's Message more than is constitutionally intended. It has been described as:

> a mere formal act, which, in its nature, does not bind him, nor the Government to carry out all the objects for which votes of public money are asked. (*R. v. Lavery*)

**185. Parliamentary Review.**—In England, practice is to lay the Estimates before the House of Commons in February, with twenty days of the session reserved for consideration of individual items—selected by lot—the remainder being then passed without debate. Canadian custom is to table after the adopting of the motion formally accepting the Speech from the Throne. All items must be called in Committee of Supply and there is no fixed time period for passing the Estimates as there is in England.

**186.** *Committee of Supply.*—The Estimates book is not addressed either to the House or to the Speaker; it is the Message of the Governor General that gives the Estimates status, the Minister of Finance immediately moving: "that the said Message, together with the estimates, be referred to the Committee of Supply". The Clerk causes a motion to be prepared for each item. House practice is conveniently summarized in Beauchesne's *Parliamentary Rules and Forms:*

> Supply resolutions are submitted in the following terms: "Resolved that a sum not exceeding... be granted to Her Majesty for... for the year ending 31st March, 19...". Each resolution is moved by the Minister for whose department the amount is to be voted. If the Minister wants to reduce the amount, he must ask one of his colleagues to move an amendment because no Member can amend his own motion. (p. 177)

When considering items in the book, the House is under no obligation to follow any particular sequence and supplementary items may be mingled with those listed in the Main Estimates.

**187.** All members of the House compose the Committee of Supply, the body that considers the Estimates in detail. The origin of this Committee is:

> The Committee of the Whole House on Supply has the name, but none of the methods of a committee. It was established in the days of recurring conflict between Parliament and the Crown as a device to secure freedom of discussion on matters of finance. The debates in the House itself were recorded in the Journal which was sometimes sent for and examined by the King; and they were conducted in the presence of the Speaker, who in those days was often the nominee and regarded as the representative of the Sovereign. By going into Committee under the chairmanship of a member freely selected, the House of Commons secured a greater degree of privacy and independence. (Report of 1918 Select Committee (U.K.) on National Expenditure)

**188.** Standing Order 56 of the House of Commons permits the House to go into Committee of Supply on Wednesdays, Thursdays and Fridays without the Speaker putting a motion to that end. However, the Order stipulates that:

> except by the unanimous consent of the House, the Estimates of each department shall be first taken up on a Monday or a Tuesday.

Since 1955, House Rules provide that on six occasions during a session the Estimates are to be called first either on a Monday or Tuesday for a named number of departments: six on the first occasion, three on each of the next four and the remainder on the last formal motion to go into Committee of Supply. There are two reasons for this: (*a*) to provide Members with opportunities to air grievances, which need not have association with an Estimates item, and (*b*) to permit consideration of a department's items on any sitting day thereafter.

**189.** Shortly after the start of the present century, the Minister of Justice introduced the practice of having one of his departmental officers seated in front of his desk when the Department's estimates were under consideration. This practice is now general, but it is an act of forbearance on the part of the House and does not extend to proceedings when the Speaker is in the chair.

**190.** Sometimes it is assumed money is available as soon as an item is passed in the House. This is not so (*see* paragraphs 117-8) but it may be useful to note that the Solicitor General of Victoria, Australia, once gave an opinion to the effect

that after the Committee of Supply had reported and the House had accepted the report, the amount voted was available to spend. The Governor asked London for instructions and was advised that the money:

> is not available until it has been appropriated by an Act of the Victoria Legislature. (Comd. Papers, 1878, vol. 56, p. 905)

**191.** *Estimates Committee.*—The whole House forming the Committee of Supply, in 1955 it was decided to establish a smaller Estimates Committee to consider:

> such of the Estimates as may be referred to it and to report from time to time its findings and recommendations to the House.

The role of the Estimates Committee is advisory, and for that purpose various departmental estimates are referred to it in order that Ministers of the departments concerned may be interrogated at greater length and reports made. The function of the Estimates Committee being only to review in detail departmental proposals, the Committee of Supply still has to decide whether each and every item be approved.

**192.** *The Appropriating Process.*—After the Estimates Committee has reported on items referred to it and the Committee of Supply has approved all items, a report is made to the Speaker; whereupon a Bill is introduced by the Minister of Finance to authorize the approved items to be charged to Consolidated Revenue Fund. While names of departments are associated with items, what the Appropriation Act does is: (*a*) by enactments, make a lump sum grant to the Crown, and (*b*) by the schedules, allocate the amount to named services and purposes.

**193.** The Bill, of course, goes to the Senate where practice is in accord with that outlined in a memorandum prepared by the chairman of a Senate committee that considered the financial powers of the Senate during its 1918 session. Extracts are:

> When the House of Commons passes an appropriation or tax Bill it must be either for the sum recommended or for some smaller sum. When the Bill is for a smaller sum, and the Ministry of the day continues to hold office, it must be assumed that the Crown has assented to the reduction. (See Todd, vol. 2, p. 391). When such a Bill goes to the Senate the amount mentioned in the Bill is therefore the sum recommended by the Crown. The Senate could not increase this sum without coming in conflict with the prerogative of the Crown to say what money is wanted. (Todd, vol. 1, p. 689) The foundation of all parliamentary taxation is the necessity for the public service as declared by the Crown through its constitutional advisers. The Senate, therefore, cannot directly or indirectly originate one cent of expenditure of public funds or impose a cent of taxation on the people...

and:

> ...To reject a Supply Bill might in olden times have been feasible, but today, with the functions of government so vast and complicated, it is unthinkable... It would means chaos. A Supply Bill should be passed as a matter of course by the Senate in almost any conceivable circumstances if it contains nothing but Supply. If other matters are inserted in the Bill or "tacked to it" these should be struck out and be made into a separate Bill or Bills.

**194.** *Interim Supply Acts.*—These Acts grant a fraction of each of the tabled Estimates to provide funds for current expenses until the Appropriation Act receives assent. An expenditure charged to a vote under the authority of an interim supply Act does not become irregular should the vote later either be withdrawn or reduced. An interim supply Act is complete in itself and remains operative regardless of the parliamentary fate of either a vote or the Estimates as a whole. In this respect, Canadian practice differs from that in some Commonwealth countries where it is regarded that an interim grant of credits lapses should Parliament prorogue without enacting an Appropriation Act. An interim grant of supply Act, being concerned exclusively with money needs in succeeding weeks, is not regarded as otherwise legislating. In other words, legislation by a 'dollar vote' takes effect only on the main Appropriation Act receiving assent.

**195.** *Supplementary Appropriation Acts.*— At any time during a session the Crown may apply for supplementary grants of Supply, but the request must always be associated with the fiscal year or the next ensuing. Of course, a vote in either the main or supplementary Estimates may be so worded that it authorizes payments to be made in other years, but in that event the vote is more than a grant of Supply; it is an enactment to create a charge on Consolidated Revenue Fund without further appropriating action. So far as the ordinary grants of Supply are of concern, the constitutional rule is that the Crown must ever be kept in position where it is dependent on Parliament for money and that is one reason why section 20 of the B. N. A. Act stipulates that:

> **20.** There shall be a session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

The Estimates may include provision to discharge an obligation several years old, but section 20 above quoted and section 25 of the FA Act stand in the way of setting aside funds to defray an expenditure maturing some years hence.

**196.** *Year-end Supplementaries.*—Section 35 of the FA Act provides that unspent balances of votes lapse on 31 March but payments may be made in April for liabilities that matured "prior to the end of the fiscal year". It sometimes happens that a supplementary Appropriation Act receives assent so late in the fiscal year that strict application of section 35 would nullify the grant of Supply. Ordinarily, notice is taken in the text of the Appropriation Act but, where not, Audit Office practice is to assume that Parliament, by implication, consents to the waiver of some statutory formalities. Of course, where a supplementary Appropriation Act receives assent reasonably in advance of 31 March, section 35 of the FA Act is to be given normal application.

**197.** *The Text of Supplementaries.*—A supplementary vote is obviously to be treated as part of an item already accepted or before the House of Commons whenever the words "further amount required" are associated therewith. In the audit it is assumed that Parliament intends that a supplementary be subject to any limitation associated with the vote which it supplements. However, it can happen that it is the text of the supplementary that introduces a limitation; if so,

that becomes applicable to the main item as well, but any expenditure already recorded does not become irregular although subsequent charges to the vote as a whole are controlled by the revised text. Conversely, when the text of a supplementary enlarges the ambit of a main vote, unspent balances of the original item become subject to the new wording.

**198. Legislating by Use of an Appropriation Act.**—Parliament has never renounced and, according to the accepted theory of its sovereignty, cannot renounce the power of dealing with particulars. Public finance has always been its prime interest:

> The English legislature was originally constituted, not for legislative, but for financial purposes. Its primary function was not to make laws, but to grant supplies. ... It has the last word in finance. It criticizes and controls the Administration at every step. ... Its legislation is of a severely practical order. What it does, what it has done for the past 600 years, is to remove discontent, and to avert revolution, by making laws which adapt the political, administrative, and economical arrangements of the country to the requirements of the times. (Ilbert, *Legislative Methods and Forms,* pp. 208-9)

Consequently, Parliament may, and does, use the Appropriation Act for the purpose of legislating. In the audit, a narrow and rather strict construction is given to enactments in an Appropriation Act because they have not been subjected to the same parliamentary safeguards as would be were the amendment made by an ordinary Bill. However, where a text clearly makes an exception from the provisions of some statute, law officers have ruled that it is not obligatory that "notwithstanding" or like expression form part of the enactment, although that is customary.

**199.** Sometimes a 'dollar vote' is used; however, the $1 in the amount column is without appropriation significance because it is inserted merely to establish a Supply motion. Where an item both legislates and appropriates a sum, the result is a specific vote.

**200.** Sometimes it happens that a vote text ends with "estimated at" or like phrase; if so, this indicates that there is uncertainty as to the amount that may be required, but the words do not permit a larger sum to be spent than is listed in the amount column. To illustrate, an Appropriation Act included the following vote:

> To provide for a reduction in the amount owing by the Old Age Security Fund pursuant to section 11 of the Old Age Security Act, representing the amount of temporary loans made by the Minister of Finance to the Fund during the fiscal year 1956-57 estimated at

with $6,000,000 inserted in the amount column. The item was submitted to the House of Commons before the year-end and proved to be an under-estimate, but on the advice of the law officers charges were limited to $6,000,000. A different test as to intent would have been applied had the six million formed part of the text with $1 listed in the amount column. It then would have been legislation rather than a grant of Supply.

## Part II—The Executive Control of Supply

**201.** An Appropriation Act makes a lump sum grant to the Crown so the first step in the spending process is an exercise of the Royal will in designating the persons (Ministers) who will control and be answerable to Parliament for the uses to which Supply grants are put. This is now a constitutional formality of no audit significance, but section 26 of the FA Act does signify that departments still are ever-subordinate and payments may not be made until the Royal consent is given, but commitments may be entered into (section 30, FA Act). The practice originated in the days of the first Elizabeth, with the release of one of the state papers requiring personal sealing and use of the sign manual. Section 26 reads:

> **26.** Where an appropriation is made for any purpose in any Act of Parliament for granting to Her Majesty any sum of money to defray expenses of the public service for a fiscal year, no payment shall be made pursuant to that appropriation out of the Consolidated Revenue Fund unless a warrant, prepared on the order of the Governor in Council, has been signed by the Governor General authorizing expenditures to be charged against the appropriation, but no payments in excess of the amount of expenditures so authorized shall be made.

**202.** It is within the discretion of the Governor in Council to recommend either a general or limited release. Once during the 1930s practice throughout the year was to make monthly fractional releases of items. This was due to the impact of a worldwide depression making it impracticable to forecast, with any degree of accuracy, what prospective revenue collections might total.

**203.** Section 26 is applicable only to Supply granted for a "fiscal year". In Canada, as in the United Kingdom, no release is necessary where a statute makes provision for charges without time limit:

> because not only are the Consolidated Fund charges imposed permanently by statute, but the money to meet them is not expressly granted to the Crown. (Marriott, *The Mechanism of the Modern State,* vol. II, p. 541)

To illustrate the distinction, reference is made to a case that involved the Minister of Finance of British Columbia. Legislation of the Province respecting registration of land created an "assurance fund" to be administered by the Minister of Finance (*see* c. 162, R.S., for a comparable federal account). The Minister, being of opinion that certain applicants were not entitled to compensation from the assurance fund, refused to pay and litigation followed. A point the Supreme Court of Canada considered was whether his status, as administrator of the fund, was that of a servant of the Crown or if he was to be regarded as the agent of the Legislature, because in the latter event he enjoyed no discretion beyond what the legislation permitted. It was decided he was a statutory agent obligated to make payments to those made eligible by the statute to its benefits. (*Minister of Finance of British Columbia v. The King*)

**204. Governor in Council vis-à-vis Treasury Board.**—Section 5 of the FA Act declares that Treasury Board functions "as a committee of the Queen's Privy Council for Canada". Ordinarily, it is subject to overruling by the Governor in Council, but it is also a statutory body enjoying, as such, some powers that are exclusively exercisable by it. Consequently, should a statute or vote stipulate

that a decision is to be evidenced by a Board Minute, an order of the Governor in Council cannot effectively take its place. An illustration is the vote for unforeseen expenses which currently opens with these words: "To provide, subject to the approval of the Treasury Board..." More than once it has been ruled that, with such a text, an order of the Governor in Council is ineffective. Of course, no audit notice need be taken were an authorization to spend evidenced by an order in council concurring in a decision of Treasury Board, but the participation of the Governor in Council would be a redundancy.

**205. The Executive vis-à-vis Departments.**—Section 31 of the FA Act requires that a Minister, or a person authorized by him in writing, requisition all payments to be charged to a vote for which he is answerable to Parliament. However, statutes, regulations and conventions impose limitations on the power of Ministers to incur public expense and that is a reason why section 70 of the FA Act requires the Auditor General to call attention to any case where an appropriation was applied "to a purpose or in a manner not authorized by Parliament". Broadly regarded, the field of a Minister in charge of a department is:

> The head of each department has the management of the affairs pertaining to it, and he can, on his own responsibility, transact all matters of ordinary official routine or of departmental administration and all further acts of administration for which statutory authorization has been given to him. All other matters have to be submitted to the executive council, and the approval or sanction of the Lieutenant Governor must be obtained before he can act concerning them. (Wurtele J., in *R. v. Waterous Engine Works Company*)

The Judge was treating with the powers of a provincial minister but his conclusion is in harmony with one reached by the federal Public Accounts Committee when reviewing 1897-98 accounts. It happened this way: An order in council directed that $8,000 be paid to a railway company, as a charge to a general vote for "immigration expenses":

> to aid the company in their efforts in connection with the repatriation and colonization of Canadians during the past two years.

In those days the Auditor General countersigned Receiver General cheques and he refused to do so because in his opinion:

(*a*) There was no legal obligation, because the Government never authorized the expenditure before it was made, was never even applied to for authorization, or notified that the expenditure was about to be made.

(*b*) There was no moral obligation. The company could have no reason to expect that it would be reimbursed any portion of the outlay because the expenditure was made with the expectation that the benefit to the company's business would repay the outlay.

He was overruled by Treasury Board so the matter came before the Public Accounts Committee. The arguments of the Auditor General did not attract much support — a motion to that end was moved but was voluntarily withdrawn and no substitute offered. Consequently, what the Committee dealt with was an opinion (personally signed by Sir Oliver Mowat as Minister of Justice) to the effect that: (*a*) it is the function of the Government as a whole to decide when the expenditure will involve a decision of policy, and (*b*) a charge to a general vote may be made whenever the expenditure qualifies within its ambit. While the proceedings of the

Committee were prolonged, a perusal of the records (there was no formal finding) indicates that it was accepted that the Minister of Justice had correctly expressed the constitutional position when he stated that:

> I think that the Government may expend this vote for "immigration expenses" in such manner as they think best adapted to promote immigration. The question then becomes one of policy for the Government to consider, and for which the Government is responsible to Parliament. I see no reason why they may not, as a matter of law, grant out of the vote for immigration expenses a reward for past meritorious useful work, or a subsidy to encourage future work, if they think that such a grant or subsidy would be promotive of immigration, and I think that their action therein is subject only to their answerability to Parliament.

This established an administrative practice and is an example of a usage agreed upon between Parliament and the Executive.

**206. Executive Directions are Binding on Departments.**—Where the Governor in Council or Treasury Board has instructed a department to act along certain lines and it fails to do so, an unlawful payment may result, even when made with the best of intentions. The case of *The King v. Toronto Terminal Railway Co.* provides an illustration. In 1915 the Government negotiated for the land on which the Toronto Postal Building now stands. Involved in the transaction were certain rights of way, etc., the Government agreeing, by order in council, to reimburse the company any municipal taxes levied on them. The Department of Public Works annually made payments and it was only when more land was expropriated in 1940 that it was discovered that, over the years, the Department had reimbursed for taxes on land not covered by the order in council. The litigation was to recover the amount so paid. The Crown succeeded:

> Parliament provided funds to make lawful payments, i.e., payments authorized by the lease. That authority cannot be widened by the Department.

Thus the Crown recovered the amount involved from the company. Whether it was within the competence of the Governor in Council to waive right to repayment, by authorizing an *ex post facto* amendment to the lease agreement, is a question of law that need not now be considered because each transaction under review in an audit is to be weighed in relation to the administrative action taken with respect to it.

**207. Outlays in Anticipation of Executive Approval.**—If a statute requires an administrative decision to be concurred in by the Governor in Council or Treasury Board, any person who acts in anticipation of such approval does so at his own risk, even when a Minister indicates his personal backing. An experience of a federal board that operated in the 1880s will be used to illustrate. The board had statutory power to employ but salary rates were to "be fixed by the board subject to the approval of the Governor in Council". The board engaged a few persons, fixed rates of pay and forthwith transmitted the proposed schedule of rates to the appropriate Minister to the end that they be approved by the Governor in Council. The Minister delayed sending them to Council but, with his acquiescence, the board gave effect to the rates. When the Governor in Council did deal with the matter, the proposed scales of pay were reduced. As a result,

there were unlawful payments and members of the board were required, in personal capacity, to make good. They sought relief but were unsuccessful, the Supreme Court of Canada deciding that:

The salaries . . . could only become a charge . . . after the sanction and approval of the Governor in Council of such salaries had been obtained . . . any sums of money paid . . . without such approval were paid illegally, and the appellants must take the consequences of their illegal action. (*Burroughs v. The Queen*)

**208. Overruling the Comptroller of the Treasury.**—The Comptroller is an officer of the Department of Finance (section 11 of FA Act) but in the exercise of some statutory obligations he is personally answerable. By section 31 he is required to reject a requisition for a cheque if of opinion that payment:

(*a*) would not be a lawful charge against the appropriation,
(*b*) would result in an expenditure in excess of the appropriation, or
(*c*) would reduce the balance available in the appropriation so that it would not be sufficient to meet the commitments charged against it.

The same section permits a department to apply to Treasury Board where the Comptroller (*a*) declines to make a payment, (*b*) disallows an item in an account, or (*c*) refuses to give a certificate required by the Act. The section then provides that:

the Board may confirm or overrule the action of the Comptroller and give such directions as are necessary to carry out its decision.

**209.** It may be that, in such circumstances, the status of Treasury Board is quasi judicial—that was the view entertained fifty years ago. However, changes in legislation since, as well as Public Accounts Committee decisions in various Commonwealth countries, cause the Audit Office to rate rulings made by Treasury Board, for the purposes of section 31, as administrative and designed to safeguard against abuse of authority by the Comptroller. It is therefore regarded in the audit that an overruling by Treasury Board is open to scrutiny and Report notice where doubt is entertained as to legality of the resulting expenditure. The illustration now given is taken from the records of Northern Ireland where the Accounting Officer is invariably the permanent head of the department. He does not keep the accounts but is answerable for all charges to votes. He may, however, be overruled by his Minister who thereupon assumes responsibility for the charge. A statute provided a scheme of scholarships, with candidates required to pass tests as to medical fitness and general suitability (the latter by a committee). The Accounting Officer refused to pay several scholarships because of failures to pass one or other of the tests. After consulting the Cabinet, the Minister of Education overruled him and the Minister of Finance concurred. In due course the overrulings were considered by the Public Accounts Committee, its decision being that payment in one case was permissive but unlawful in the others. The report adds:

Your Committee has noted that the Ministry of Finance has given its approval to extra-statutory payments being made in each of the foregoing cases to cover the expenditure incurred for one year but has been informed that such approval was not given by the Ministry of Finance until after the matter had been discussed and decided by the Cabinet. Your Committee are unaware of the reasons which led the Cabinet to arrive at this decision. As, however, your Committee has found that the payments are unlawful in five of these



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cases it is the view of your Committee that the approval given by the Ministry of Finance does not regularise the position and that these payments remain unlawful and ought not to have been made. (Special Report, 1957)

Before this report was considered by Parliament, the Minister of Education died so the action taken was to validate, by means of an Estimates item, all scholarship payments made in the year.

## Part III—Application of Votes

**210.** Neither the FA nor any other Act vests in the Auditor General a power to disallow an expenditure or to surcharge anyone. His duty is to draw the relevant facts to the notice of the House of Commons whenever doubt is entertained as to the legality or propriety of a transaction. When he does so, the next step is an inquiry by the Public Accounts Committee; then, should the Committee be of opinion that an unlawful payment has been made, its report takes the form of recommending to the House that the expenditure be disallowed. Constitutionally, the next step would be a resolution of the House disallowing the expenditure, but usage is that an investigation be first made by the Minister of Finance to establish whether it is practicable to recover the money or, alternatively, the House should be invited to regularize the transaction by means of a special item in the next Estimates.

**211.** Unless Parliament imposes limitations in the text, a vote may be applied to any purpose within the ordinary meaning of the words used, provided the vote is not regulated by other legislation. Morally, a Government may feel bound to respect a pledge given by a Minister to the House when the item was under discussion; but even a resolution of the House is without legal significance in applying a vote. Paragraph 118 in the Revenue chapter gives a quotation on this point but one relating to expenditures may also be of use, so an illustration, drawn from British records, is now given. In 1859 a Mr. Churchward had a contract for carrying the mails across the English Channel. Although the contract had still four years to run, he secured an upward revision of rates and a period of years extension during a general election. A change of government was followed by a House of Commons inquiry into the new contract. A resolution of the House condemned the extension and new rates, but accepted the original contract as still binding on the Crown. A clause in the 1863-64 Supply Bill was:

> That no part of the sum of £950,000 voted by Parliament in the session of 1863 to defray the charges of the Post Office Packet Services shall be applicable, or applied towards making any payment in respect of the period subsequent to the 20th June 1863, to Mr. Churchward, or to any person claiming under his contract of the 26th April 1859, with the Commissioners of Her Majesty's Admiralty.

Objection was taken to this on the ground that, if no payments were to be made, the appropriate legislative action was to declare the 1859 contract null and void. In reply, it was stressed that the Government did not wish to bar Churchward from taking the matter to the courts. The Solicitor General also pointed out that, the earlier vote of the House lacking the effect of law,

if the House voted money for the packet service generally without any specific appropriation to, or exclusion of particular services, Parliament then would be said to have provided means for the fulfillment of this contract. (Debates, 18 May 1863)

Churchward was unsuccessful in litigation but the Epitome of Reports of the Public Accounts Committees notes that, on the advice of the law officers, a like prohibition was annually included in the Supply Bill until the 1859 arrangement expired in 1875.

**212.** Conversely, it is to be borne in mind that a vote is not to be regarded as suspending, by implication, limitations imposed by other statutes. When a vote text takes the form of an enactment it can achieve that end, but ordinarily:

> The object of supply and appropriation is simply to furnish the Crown with authority and opportunity to obtain the money it desires for the government of the country. The Committee of Supply inquires as to policy and expediency and as to extravagance. It secures publicity and locates responsibility. It is not examining the transactions involved with a view to determining whether statutory conditions will be or have been observed. (Isaacs and Rich JJ., in *Commonwealth of Australia v. Colonial Ammunition Company*)

In its proper technical sense an ordinary vote item does not legislate; instead its purpose is to fix the amount that may be spent for a certain purpose. Therefore, any enactments in other statutes that are applicable to the expenditure policy regulate the application of the vote.

**213. Categories of Votes.**—Appropriation Act votes are either specific or general. In Canada, approximately one-third of the number in a Main Appropriation Act are, as a rule, specific. Auditors will bear in mind that there are varieties within the category. For example, the text may recite all legislative directions applicable, while in other cases application is subject to the provisions of some other statute. The dimensions of the amount associated with an item are without significance in determining the category to which it belongs. There are votes of many millions—war pensions for example—that are 'specific' and there are votes of a few thousands that fall within the category of 'general'. The test is whether the spending department may exercise a discretion in applying the vote to a variety of purposes. If it may, the vote is a general one. In turn, if the sole discretion enjoyed is to spend or not to spend for a named purpose, it is a specific vote with an audit obligation to ascertain whether it was so applied.

**214. "The Public Service of Canada".**—To make any charge to a general vote a legal one, the expenditure must be to promote a purpose of government. The B.N.A. Act declares that the revenues are to be appropriated for "the public service". The ambit of the phrase is a question of law, but it may be of some assistance in the audit to note that a court in India has declared that the term 'public purpose' means:

> an object or aim in which the general interest of the community, as opposed to the particular interests of individuals, is directly and vitally concerned. (*Hamabai Framjee v. Secretary of State for India*)

In other words, while every payment benefits someone, there must also exist some resulting public benefit which may be remote or indirect, but the expenditure must be founded on the consideration that it is believed it will be for the general public good.



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**215.** It does not necessarily follow that the Executive enjoys a discretion without boundaries; the object of the expenditure must be one within the field of federal responsibility. This is a question of law but some guidance to auditors may not be out of place. The constitution of Australia is broadly comparable, but is not on all-fours, with that of Canada. In that country there have been several cases before the courts relative to the capacity of the Commonwealth to appropriate "for purposes of the Commonwealth" and it is now regarded that the phrase does impose some constitutional limitations. On more than one occasion the Canadian Parliament has briefly debated the matter. For example, in the 1930s during a debate on the significance of a decision of the Judicial Committee of the Privy Council, a leading member of the Opposition remarked:

> This opinion, if it is valid, raises grave doubts as to the validity of appropriations by this Dominion Parliament of current revenues for such objects as old age pensions, unemployment relief, or for giving assistance to provincial undertakings of any description. (Hon. C. H. Cahan, Debates, 5 April 1937, p. 2576)

**216.** It is of some significance that since then the B.N.A. Act has been amended to give authority for unemployment insurance and old age security legislation. Debates and enactments permit the view that consensus of parliamentary thought (something to be considered in preparing the annual Report to the House of Commons) leans to the view that Parliament may make grants, and even associate conditions therewith, for purposes within the provincial field so long as the aim is not to supplant provincial jurisdiction as defined by the B.N.A. Act. The audit problem is a payment where, without special parliamentary notice, the Crown charges a general vote for a purpose that is provincial or municipal. The point is one of law and there is no clear ruling by the Public Accounts Committee. However, it is assumed that the Auditor General will take particular notice of any such payment and, where expedient, draw the attention of the House of Commons to it.

**217. Votes Subject to Other Legislation.**—When charges to a vote are controlled by some statute, the Crown enjoys no discretion in making charges. The illustration now given is taken from the records of New Zealand because the case was ultimately the subject of decision by the Judicial Committee of the Privy Council. By special Act, authority was granted to negotiate for land and, should a certain company agree to lease it from the Crown, the Minister of Finance could charge Consolidated Revenue Fund with the purchase price. A lease was negotiated but was never signed because the Government later decided to take the land for railway purposes, and did so, making the cost a charge to a general vote for land purchases. Thus, no use was made of the special Act and it was the legality of the charge to the general vote that was at issue in the litigation that followed. The Chief Justice of New Zealand took the view that the Government had acted within its powers because the text of the general vote clearly provided for land purchases for the purposes to which the land in question was being put. However, the majority of the court took a different view, accepting that of one of the judges who said:

> This is a specific statutory authority conferred in the public interest to pay out of the public funds particular sums of money upon a certain event occurring, and unless it can be shown that the Minister of Finance had power *aliunde* to waive or dispense with the satisfaction of

that condition it appears to me to be beyond question that a payment otherwise than upon that event would be unauthorized and unlawful. ... In the case of an enactment such as this—namely, one to authorize the disbursement of public money in a given event—I think it would be dangerous to allow of a loose construction enabling the conditions of the authority to pay to be treated as complied with if something else deemed by the Minister to be an equivalent is done. (*Auckland Harbour Board v. The King*)

The Judicial Committee specifically approved this, held the payment to be one unlawfully made and that the money was to be recovered.

**218. Crown Not Obligated to Spend.**—In applying an Appropriation Act, departments enjoy discretionary powers in making use of votes, provided: (*a*) vote texts are construed in a manner that harmonizes with the ordinary meaning of the words used, (*b*) no other statute regulates and (*c*) constitutional usages are respected. An Appropriation Act, in the words of Maitland, "is certainly not in the jurist's sense a law, it is no general rule". What it does is to grant permission to the Crown to spend but it does not compel the Crown so to do. Again quoting Maitland:

Money is granted to the queen; it is placed at the disposal of her and her ministers. But she and they are not bound by law to spend it, at least not bound by the Appropriation Act. Of course, if the queen's advisers withdrew all ambassadors from foreign courts, or disbanded the navy or the like, they might be severely blamed and possibly they might be impeached. But the statute does not say to the queen: 'you shall spend so much on your embassies, so much on your navy'. Rather its language is: 'Here is money for this purpose and for that; spend it if you please; we trust the discretion of your advisers, the account of the expenditure will be presented to us, and votes of censure may follow'. (*The Constitutional History of England,* p. 445)

**219.** It being wholly within the discretion of the Crown to spend, no person, association, etc., is ever to be regarded as imperatively entitled to a payment because of some specific reference to him or it in a vote text. Section 31 (1) of the FA Act is explicit. It declares that:

**31.** (1) No charge shall be made against an appropriation except upon the requisition of the appropriate Minister of the department for which the appropriation was made, or by a person authorized by him in writing.

One purpose is to signify that the Comptroller of the Treasury lacks authority to originate a charge; another is to indicate the discretionary rights of the Crown.

**220.** Too frequently it is assumed there is no option whenever a name is associated with a vote, therefore some illustrations, based on court decisions involving different types of claims, are now given.

**221.** *Reimbursing Another Public Authority.*—A British vote provided money for legal expenses incurred in "prosecutions ... formerly paid out of county rates". It was arranged that, after accounts were taxed by court officers, each county would settle and then apply to the Treasury for reimbursement. The Treasury refunded less than one county had paid out so it was out of pocket. An order of the court was sought to compel the Treasury to reimburse the full amount but the decision was that, as the vote did not create an enforceable right, the duty on the Treasury was merely to advise a minister what amount seemed to be appropriate in each case. (*The Queen v. Lords Commissioners of the Treasury*)

**222.** *Right to Salary.*—A £600,000 vote was for salaries and allowances to members of the British Foreign Office. After his dismissal, an officer sought payment of an amount he

considered due for salary and allowances, contending that he, as holder of the position when the item was submitted, had a vested right to the money. He failed, it being held that:

> ... Parliament has merely voted certain sums to Her Majesty, and of those sums £600,000 are to be applied to the Foreign Office. The distribution of that amount is left to the officers of the Foreign Office to apply in such manner as is most subservient to Her Majesty's service, and in due support of the Foreign Office, and there is nothing whatever to connect the Plaintiff with a penny of this money in any respect. It is impossible for me, therefore, in that state of things to say that there is any trust for him. (*Grenville-Martin v. Clarendon*)

**223.** A contrasting case is given to warn against reading into a text something that is not there. A Manitoba statute created a position of public service commissioner, he to be paid "such remuneration as may be fixed by the Lieutenant Governor in Council". An appointment was made at a salary of $6,000. Subsequent legislation transferred various functions to a Minister but the commissioner continued in office. However, later Appropriation Acts provided $2,000 only for his salary. After being retired from office by order in council he sued for $13,700, which was the difference between that paid and the $6,000 rate. He relied on a provision in the Public Utilities Act that the salary of the commissioner and the expenses of his office "shall be paid monthly out of the Consolidated Revenue Fund of the Province" and succeeded, it being decided that the words just quoted:

> cannot be considered to imply a condition that there must be a special vote of supply for the expenses of the commission, and the fact that the Legislature did make such special votes from year to year does not establish that such practice was legally necessary, it appearing that under the statute the expenditure was authorized in advance, and, with slight variations, was not subject to change. (*Macdonald v. R.*)

**224.** *Votes to Permit Ex Gratia Payments.*—During the Black-and-Tan period numerous buildings were destroyed in Ireland. The owner of a castle recovered most of his loss out of insurance but was still £4,000 out of pocket. He claimed the amount from the Irish Free State Government because: (i) it had given an undertaking to the British Government to compensate those who had suffered property losses, (ii) over £7,000,000 had been voted for the purpose, and (iii) the claim had been certified by a duly authorized commission. He failed because:

> If a sum is appropriated to meet purely *ex gratia* payments, sanctioned for payment by the Minister of Finance, the appropriation does not give a right to the payments. (*Leen v. Irish Free State*)

**225.** *Work Performed Under Unauthorized Contract.*—A new Quebec Government refused to recognize a contract that had been irregularly authorized. There were several of like nature, so the Government included in the Estimates a vote to permit payment if, after investigation, it was decided any claims should be recognized. The account now of concern was included and the contention was that the vote text obligated the Government to pay. The case was carried to the Supreme Court of Canada where it was unanimously agreed that the trial judge was right when he declared that the vote:

> certainly put it in the power of the executive to pay the amount, but it did not force them to do so.

As this is one of the few instances where the Supreme Court of Canada has directed its attention to the text of votes, an observation of Gwynne J. is added:

> The plain and natural construction of the item containing the grant of $9,872.68 is that this sum is granted to Her Majesty to be expended for the purposes named in the grant, at the discretion of the Provincial Government, but subject to the ordinary control of Parliament over the manner in which all moneys granted to the Crown for specific purposes shall be expended, and did not divest the Government of its duty to see to the proper application of the moneys, or impose upon the Government a contract it had never entered into nor authorized. (*Jacques-Cartier Bank v. The Queen*)

**226. Grants in Aid.**—Among types of specific votes is that providing for a grant to a named body. Prior concurrence of Parliament to such a payment is a requisite: (*a*) to signify that the payment will be one within the meaning of "the

public service of Canada" in sections 102 and 106 of the B.N.A. Act, and (*b*) to sanction an outlay where no accounting will be made to the House of Commons of the ultimate application of the money. A word of explanation is now given with respect to the latter, because the principle involved can limit the power to originate a grant in aid to be a charge to a 'general' vote. A British vote included provision for the making of a grant in aid to the Lord Mayor's Fund for the relief of Armenian refugees. The vote also provided for other outlays and did not fix a precise amount for the grant to the Fund. The Public Accounts Committee took exception:

> We are strongly of opinion that in all future cases where Parliament is asked to vote money as a grant in aid the exact amount of the grant should be specified in the Estimates so that Parliament may be aware of the precise sum which it is proposed to exempt from the ordinary conditions which govern accounting for voted money. (1923 Reports)

**227.** Where the text of a vote permits a grant to some non-governmental body, payment may be made only to the named body, i.e., no substitution is permissive. Nor may the payment exceed that stated in the vote; a charge to a general vote to permit more generous assistance would be an irregularity to be reported.

**228.** Unless the text so requires, or the Crown made it a condition, the recipient body need neither make an accounting nor refund any unspent balance at the year-end; but if an accounting is stipulated, the payment is to be regarded as an accountable advance.

**229.** A problem that sometimes presents itself in the audit is where a vote permits a grant in aid to a named body, which is paid, and during the year the same organization is compensated from another vote for services performed on behalf of a department. Except when special considerations have to be taken into calculation, the Office view is that, unless the vote text so stipulates or it is made a condition of payment, the recipient of a grant in aid is under no obligation to render services gratuitously to the Government. Therefore, if a department requires the services of the recipient body for some administrative need, the relationship is one of contract and an element of profit will not make the arrangement irregular.

**230.** Where a grant in aid is subject to a condition, a limitation is imposed on the authority to pay. For example, the Canadian Maritime Commission Act, c. 38, R.S., provides that the Commission shall:

> administer, in accordance with regulations of the Governor in Council, any steamship subventions voted by Parliament.

Current practice is to vote a lump sum for steamship subventions "as detailed in the Estimates" with the vote listed under the Department of Transport. The position is: (*a*) no service identified in the Details is automatically entitled to payment of an amount listed, (*b*) services that may be subsidized must qualify within the text of the Details, (*c*) the Maritime Commission must be a party to any agreement, (*d*) the agreement is to conform to any regulations made by the Governor in Council, (*e*) the undertaking to pay may not exceed the amount listed for the particular service in the Details and (*f*) the terms and conditions of the agreement must be complied with before the charge is legal.

**231.** It is a matter of Executive discretion whether the Governor in Council or Treasury Board signifies concurrence before grant in aid payments, listed in votes, are made. However, it is to be expected that there be an Executive authorization whenever a recipient of a grant in aid has a contractual relationship with a department.

**232.** In addition to payments specifically recognized by votes, a grant (not noted in the Estimates) is sometimes made to an organization for a purpose of local rather than national significance. It may only be a general vote charge and Commonwealth practice is to regard such a payment as a gift or subscription. In other words, the payment is akin to a public relations outlay. An auditor need not take notice unless (*a*) the amount is substantial, or (*b*) the circumstances are unusual. Of course, such a payment should have Executive sanction because governmental policy, to a limited degree, is involved.

**233.** ***Ex Gratia*** **Payments.**—The authority to make *ex gratia* payments is lost in the mists of the past but for audit purposes it is assumed that the power stems from section 9 of the B.N.A. Act:

> **9.** The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

The true *ex gratia* payment is an act of benevolence done in the public interest, is wholly gratuitous and as an act of grace in an area of government which is not already regulated by legislation. But there are also, for Appropriation Act purposes, *ex gratia* payments that are founded on financial considerations. An example is one made to secure release from the hazards of litigation. The Crown does not admit liability, but considers it prudent to avoid the costs and risks of litigation by making a payment. Thus, something is secured in return although it may be that the courts would ultimately hold the Crown blameless.

**234.** No department may assume complete responsibility for the decision to make an *ex gratia* payment because, regardless of amount, public policy is involved. An Executive authorization to pay is an essential (*see* paragraph 205) save where litigation has commenced and the Attorney General arranges a compromise settlement. It is to be borne in mind that the Crown ordinarily does not enjoy an unfettered discretion. A case noted in the 1956 Audit Report will be used to illustrate. A statute authorized payment of gratuities to those who served in Korea, the amount to be based on length of service prior to a stated date. An order in council directed that an officer, who had been a prisoner of war, be paid a gratuity calculated to the date of his release. As this was subsequent to the limiting date in the Act, the payment was necessarily reported as one made contrary to the provisions of an Act.

**235.** Assuming decision to pay is within Executive competence, the transaction is not of audit interest. However, it is to be borne in mind that the aim of the order in council may not be to bring monetary profit to the recipient; the privilege of the Crown is to afford compensation for a loss or harm already suffered. Put

another way, payment may not anticipate a situation still to develop. An auditor has also to bear in mind that the Executive may act only when a suitable general vote is available to charge.

**236.** Payments that become the subject of litigation generally involve bodies which are, practically speaking, wholly regulated by legislation. However, one case is now referred to because of the point in issue. In 1920 the United Kingdom Parliament directed that motor vehicle licences be issued by local authorities, they to be compensated by the Ministry of Transport. One county council assigned the work to its chief accountant without salary increase and it was only in 1925 that he was given a general increase of £100. Six years later the council took notice of the fact that in the previous ten years it had received from the Ministry a sum considerably in excess of costs incurred. It was decided to give the chief accountant an *ex gratia* gift of £700 for past services and to allow him, in future, to retain whatever was received from the Ministry. This resolution was challenged as *ultra vires* and the matter ultimately reached the Court of Appeal where it was held that the local authority had acted legally in raising the man's salary by authorizing him to take future moneys, but the £700 *ex gratia* payment for past services was *ultra vires*. For example, in the course of his judgment one of the judges observed:

> It appears to me that to allow representative bodies, years after the remuneration of their officers has been clearly fixed, to make further payments in respect of past years because they thought that their predecessors had not paid enough, would be most prejudicial to the working of local government and unreasonable in the highest degree. (*In re Macgrath*)

In his words, the payment was "unreasonable and contrary to law", adding that the decision should establish that "this kind of retrospective *ex gratia* payment is contrary to law".

**237. Nugatory Payments.**—This expression apparently was coined in Britain by a Service Force. It is a payment that is distinguishable from an *ex gratia* one in that a liability is recognized. A British definition is:

> A nugatory payment is one involving an immediate or formal loss—that is the payment of money in return for which no service is rendered. It does not include constructive loss—that is, cases where due service is rendered in return for the payment, although, owing to a change of policy, error or judgment, or otherwise, the service rendered does not have the utility intended. (Regulations for the Army)

Thus a payment for stores not delivered owing to cancellation of contract is a nugatory payment while a payment for stores delivered, but already obsolete, is a constructive loss.

**238.** An Executive concurrence to a nugatory payment is to be expected whenever the amount is substantial or the surrounding circumstances exceptional because, to a degree, the repute of the Government is involved. Audit interest is in whether the attention of the House of Commons should be drawn to it. For example, the British Public Accounts Committee indicated in 1907 that its Auditor General was expected to call attention whenever a financial loss was suffered as a result of a change of policy, except where the loss was being suitably disclosed in



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the published accounts. Generally speaking, Canadian practice is to note in the Report only when the matter would appear to be of public interest from the viewpoint of 'merit'.

**239. Expenditures Recklessly Incurred.**—Although an expenditure may be incurred in normal manner, if the resulting cost be so unreasonable as to connote extravagance, an audit obligation is to regard the outlay as one made without authority. An illustration is given in paragraph 359 of the chapter on Contracts, but an illustration of a different type may also be useful. In 1920 the British Public Accounts Committee disallowed charges totalling £6,416 incurred during World War I in connection with an information office in Lisbon. The Committee directed that the accounting officer personally make good £101 (which he had expended contrary to Treasury directions) and he did so. As to the balance, it was left to the Treasury to decide what persons should be required to pay the money. The subsequent report of the Treasury to the Public Accounts Committee included the following:

> The effect of disallowing a charge made against a vote is that the Accounting Officer has an item in his expenditure for which he can obtain no discharge. ... This shortage can be made good either by the recovery of the amounts expended or by a vote of Parliament authorizing the expenditure and so enabling the Accounting Officer to obtain a discharge for it.
>
> In the present case, without the knowledge of the Accounting Officer, expenditure was authorized and incurred, in time of war, by officers most of whom had no experience of the public service. After a careful review of all the facts, My Lords feel that it will be proper for them, in the very exceptional circumstances of the case, to ask Parliament to authorize by vote a charge for the major part of the expenditure involved in the establishment of the bureau.
>
> They are compelled, however, to regard some of the expenditure as unnecessarily extravagant. ... They propose, therefore, to reduce the amount which they are prepared to ask Parliament to vote from £6,416 to £5,719 and to request the officers concerned to refund the balance. (Epitome of Public Accounts Committees Reports, p. 607)

Whereupon a vote was submitted to the House of Commons for £5,719 and it was granted. Efforts to collect the balance proving abortive, a couple of years later a vote granted the residue.

**240. Vote for Unforeseen Expenses.**—The practical need for such a vote is obvious, but it does weaken control over expenditure by parliamentary appropriations to services. Audit notice is therefore taken whenever (*a*) the effect is to materially expand the resources of another vote, or (*b*) the charge is substantial or exceptional. To illustrate the second: In Britain the counterpart to our vote is a statutory Contingencies Fund. In 1935 the Public Accounts Committee took notice of a £93,000 advance from this fund in December 1933 to purchase the Codex Sinaiticus from the U.S.S.R. A public campaign for subscriptions reduced the advance to £41,440 and in July 1934 a vote was obtained to recoup the Civil Contingencies Fund. The Public Accounts Committee was of opinion that the Contingencies Fund should never have been used "in view of the differences of opinion which were known to exist on the subject of this purchase".

**241.** Another problem in the audit is the answer to the question: When may an expense be rated unforeseen? Parliament taking no cognizance of the administrative process before tabling, time could run from the date on which the Main

Estimates were tabled or from that on which the parliamentary session ended. The Office favours the first, as it seems reasonable to assume that an aim of the vote is to make provision for unprovided urgent needs that may arise during the parliamentary session — a period in which a Governor General's special warrant may not issue under authority of section 28 of the FA Act unless the House stands adjourned for a fortnight or longer.

**242. Liability to Pay Interest.**—The Crown is rarely as vulnerable to interest charges as is the ordinary citizen. One reason is section 38 of the FA Act:

> **38.** It is a term of every contract providing for the payment of any money by Her Majesty that payment thereunder is subject to there being an appropriation for the particular service for the fiscal year in which any commitment thereunder would come in course of payment.

The section stands in the way of an implied obligation to pay interest should the Government be slow-pay. It does not bar a contract providing for interest payments but, because the FA Act vests generally in the Governor in Council the exclusive right to fix interest rates, an auditor will expect that the Governor in Council specifically authorized an interest liability clause to be included in the contract unless there has been a delegation of power to Treasury Board under section 5 of the FA Act. Because of its generality, a short and unanimous decision of the Supreme Court of Canada is now quoted to state the general position. The Government had requisitioned the use of a ship during World War I and the point at issue was whether the Crown should pay interest on the principal amount. The Court decided:

> The right to interest does not depend on the income earning capacity of the property requisitioned. Where interest is allowed, it is on the ground of contract, express or implied, or by virtue of a statute. It is allowed on the purchase money of land which is the subject of a sale; or on the value of land which is the subject of expropriation under certain statutes—but that is upon the ground of implied contract which is deemed to arise on the ground of giving of "notice to treat".
>
> Here there is nothing of the kind. This is a case of appropriation of personal property. No provision is made for the payment of interest. There is no case of implied contract; and the statute under which the requisition was made does not provide for interest.
>
> Interest is really asked for here as damages for detention of the compensation money pending the ascertainment of what is due. As such, it cannot be recovered. (*The King v. MacKay*)

**243.** This decision antedates section 20 of the FA Act which reads:

> **20.** (1) Money received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to the provisions of any statute applicable thereto.
>
> (2) Subject to any other Act, interest may be allowed and paid from the Consolidated Revenue Fund in respect of money to which subsection one applies, in accordance with and at rates fixed by the Minister with the approval of the Governor in Council.

The phrase "special purpose" is not defined in the Act, so the Audit Office assumes that moneys within the ambit of the section are those voluntarily paid over and not classified in the accounts as Revenue. It is also regarded that the aim of subsection (2) is not to create a right to interest but to empower the Crown, if it so decides, to charge Consolidated Revenue Fund with interest costs. In *Roger*



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*Miller & Sons v. The King*, the Exchequer Court rejected a claim for interest on a security deposit given for the purposes of a contract because:

this deposit cannot be regarded as a portion of the cost of the work as defined by the contract; it was in the nature of a guarantee for the carrying out of the contract, and was a condition which the contractor had to fulfill. In the absence of any provision in the contract whereby the Crown was to pay the contractor interest upon deposits of this character, I do not see how this claim can be allowed.

A 1957 English decision treats with an erroneous tax levy and a demand for interest when the courts directed a refund to be made. A man sold £2 million worth of shares to an investment company on the basis of 125 annual payments of £44,000 each. This agreement was subject to stamp duty and the Inland Revenue Commissioners demanded and collected £110,000. The taxpayer appealed to the courts and a year later decision was in his favour—the levy being reduced to £17,600. The Stamp Act makes no provision for interest on overpayments, so the Court was asked to order payment of interest on the £92,400 refund by relying on a section in another statute which empowers judges, in their discretion, to allow interest when entering judgment against the Crown in cases involving "debt or damages". The application was rejected, because the Stamp Act requires that the taxpayer first pay before appealing to the courts:

So as a condition precedent to an appeal the appellant has to pay the duty and the document is stamped accordingly. In my judgment that gives rise to no relation of debtor and creditor at all. (*Western United Investment Co. v. Inland Revenue Commissioners*)

**244. Liability to Pay Taxes.**—Section 125 of the B.N.A. Act declares that:

**125.** No lands or property belonging to Canada or any Province shall be liable to taxation.

It will be observed that the text prohibits a levy, not payments; consequently, a payment is not automatically irregular. A decision in Scotland will be used to illustrate. A statute exempted naval vessels from harbour charges but for many years the Navy made *ex gratia* payments to many harbour authorities. In 1916 the Financial Secretary of the Treasury undertook to pay larger sums during the war. This undertaking not being fully honoured, the Wick Harbour Authority sued on the ground of contract. The Court, after noting the statutory exemption from liability, reached the following conclusion:

It was suggested, rather than urged, by the Lord Advocate, that in virtue of this statutory exemption no binding agreement for payment of rates and dues can be made on the part of a Government department. But a Government department, though not liable, may, subject to the provision of the money by Parliament, pay harbour rates and dues just as it pays local rates. And if it may pay them I think it may undertake to do so. (*Wick Harbour v. The Admiralty*)

**245.** Whenever a department is of opinion that taxes, or the equivalent, should be paid, a concurring Executive authorization is necessary because a question of public policy is involved. However, even the Executive lacks clear authority to authorize a payment when other legislation is applicable. For example, where a municipality is one within the scope of the Municipal Grants Act, c. 182, R.S., more generous treatment may not be extended than that Act permits.

**246. Provincial and Municipal Taxes on Sales, Gasoline, etc.**—By reason of section 125 of the B.N.A. Act, the Government of Canada is not liable to provincial and municipal taxes levied on sales, meals, gasoline, etc. As an aside, it has been ruled in the United States that the federal Government is not liable to municipal parking meter charges when the space is part of a public street but may be when a municipal parking lot is involved. The levies now referred to are often included in purchase price. Where the amount involved is easily established, an obligation exists to apply for refund; however, it is not Audit Office practice to call attention to a failure so to do where the cost of proving the claim could be out of proportion to amount involved. Nor is audit notice taken where a cost audit discloses that costs of a contractor, performing a firm price contract, include local levies; but notice is taken when local taxes are included in claims under a cost-plus agreement.

**247.** *Charges for Services.*—Because a provincial or municipal charge has some characteristics of a tax, it does not necessarily follow that the Crown in right of Canada is immune. An illustration is a case where the Government expropriated land and applied to a Registrar of Land Titles for a registration certificate. The Government contested liability to the Registrar's charges but it was held (*Atty. General of Canada v. Registrar of Land Titles for British Columbia*) that, as the Expropriation Act gave the Crown the strongest possible title without any necessity to register under the Province's Act, the Government was not being taxed but was being charged for a service performed at its request. The ordinary motor vehicle licence levied by provinces annually is a tax that may not be enforced against the Government of Canada, but it is a public convenience to have a record maintained and identifying plates affixed to vehicles. Therefore payments are made for the plates, recording of numbers, etc., and the issue authority may claim a reasonable amount for its service.

**248.** *Taxes on Leased Property.*—When real property is leased by the Crown the lease sometimes provides that the department concerned will pay all, or a share, of the municipal taxes. From the audit viewpoint, such payments are rental charges, even when payment is made directly to the municipality.

**249.** *Tolls and Like Charges.*—Section 209 (1), as amended, of the National Defence Act, c. 184, R.S., provides that:

> **209.** (1) No duties or tolls, otherwise payable by law in respect of the use of any pier, wharf, quay, landing-place, highway, road, right of way, bridge or canal, shall be paid by or demanded from any unit or other element of the Canadian Forces or an officer or man when on duty or any person under escort or in respect of the movement of any materiel, except that the Treasury Board may authorize payment of duties and tolls in respect of such use.

In 1956 a case before British courts involved a text in an agreement somewhat similar to the foregoing, a question being whether an Army truck (normally entitled to free passage) should pay a bridge toll when carrying soldiers on leave. It was decided that:

> The driver is the person who gives the character of the vehicle. If he is on duty, the vehicle is on duty. (*Nyali v. Atty. General*)

**250. Expropriation Payments.**—As expropriation notices duly registered vest title forthwith in the Crown, no tax liability exists after that date. Taxes levied but not paid when land becomes Crown property are encumbrances to be removed by the previous owner in order to obtain compensation under section 23 of the Expropriation Act, c. 106, R.S. If the year's taxes were paid prior to expropriation, the owner has no right to demand a pro-rating over the respective periods of ownership. Where provincial legislation makes land liable to tax from the start of a year although the municipal authority does not levy until later, the previous owner is liable although the land was expropriated prior to action by the municipality. Of course, it often happens that departments negotiate settlements without going to the Exchequer Court and in such a settlement it may be provided that the department will pay directly the taxes levied on the land expropriated; however, the payment should be treated as part of the 'compensation' for the taking of the land.

**251. Payment Before Debt Matures.**—It sometimes happens that land, for example, is acquired by purchase but title is not vested in the Crown before the year-end. Where there has been a payment on account or a lawyer acting for the department holds a cheque for the amount, a problem may be: What year should be charged? The Office view is that any payment before transfer of title is in the nature of an advance. A land transaction is one subject to the provisions of section 32 of the FA Act, which reads:

> **32.** No payment shall be made for the performance of work or the supply of goods, whether under contract or not, in connection with any part of the public service, unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister or other officer authorized by such Minister certifies
>
> (*a*) that the work has been performed or the material supplied or both, as the case may be, and that the price charged is according to contract, or if not specified by contract, is reasonable, or
>
> (*b*) where a payment is to be made before completion of the work or delivery of the goods, that the payment is in accordance with the contract.

**252.** A good illustration is given in the proceedings of the 1896 British Public Accounts Committee. Land had been purchased in Ireland but title was not transferred within the fiscal year so the buying department secured an order by the Irish Land Judge permitting the amount to be paid into court pending formal transfer of title. It will be observed that the department did its best to establish a case for a final charge to a particular year but it was admitted to the Public Accounts Committee that the aim was to avoid asking for a new vote in a subsequent year. It was decided that:

> the sale of the property had not been completed; the title had not been made good; and there was not at the time of payment either a liability which had matured or any immediate prospect of its establishment.

The outcome was that the Treasury required the department to recover the money from the court and surrender it to Consolidated Fund.

**253.** A somewhat different position may exist when land is expropriated. Title is forthwith in the Crown so a payment to the previous owner or into the Exchequer Court may be made as soon as expropriation takes legal effect. Any such payment may be recorded as an expenditure of the year in which made.

**254.** A New Zealand land case illustrates how precise the courts incline to be when interpreting a power to spend. A statute vested in a Minister a power "to purchase or otherwise acquire" land for a State Forest. He negotiated with a landowner and agreed to pay £35,000 for an irrevocable option to purchase, the amount to become part of the purchase price were the option exercised. He never paid the £35,000 nor did he proceed with the matter further—clouds on the titles being one reason. The action was to get judgment for the £35,000. The decision went against the plaintiff, one reason being that the Minister's authority to spend public money was limited to the "purchase of land", it being held that this did not provide authority to spend money on options. (*Rayner v. R.*) It will be observed that the transaction was one controlled by a special Act; had it been a general vote charge, the taking of an option might not have been an irregularity but rather a nugatory payment if the option were not converted into a purchase.

**255. The Year to be Charged.**—The influencing consideration is the intent of the vote of concern and the declaration in section 25 of the FA Act:

> **25.** All estimates of expenditures submitted to Parliament shall be for the services coming in course of payment during the fiscal year.

The words "coming in course of payment" were taken originally from the British Exchequer and Audit Act of 1866 and for the purposes of that statute are construed to mean:

> not only that the payments shall have matured, but that the operation of authorising payment shall have been completed before the end of the year.

That is not wholly appropriate in Canada because section 35 of the FA Act permits payments in April if the goods were received or the services rendered prior to 31 March. Moreover, the contractor may have done his part but further Executive action is necessary before payment may be made; for example, amending an allotment of a vote, concurring in payments for extras, etc. What is permissive? It is Audit Office practice to regard section 35 as regulating contract commitments of departments rather than administrative procedures of government. Therefore, provided a service is performed by 31 March and is in order, the Office does not normally regard it as an irregularity should payment subsequent to that date be made on the strength of an Executive authorization bearing an April date.

**256.** Administrative services go on from year to year, the bookkeeping cut-off being solely for the purposes of making an accounting to Parliament. It need not be regarded in the audit that, because a power to spend lapses on 31 March, an irregularity results whenever a department purchases, as a charge to the old year, supplies necessary for spring activities. For example, it is obviously prudent that a department operating farms make certain before the end of March that it has the necessary seed, equipment, etc., for spring seeding operations. However, a different view would necessarily be entertained were outlays made in March for harvesting supplies and equipment. A presumption then would be that the expenditure had not been dictated by administrative need but by the fact that money would otherwise lapse in a vote; in other words, the true intent probably was to use up a lapsing balance.

**257.** It is for reasons such as the foregoing that auditors are expected to scrutinize year-end transactions, particularly when expenditures appear abnormal in the last sixty days of the year. Conversely, when the lapse in a vote is unusually small, transactions in the opening weeks of the new fiscal year are to be reviewed to ascertain the extent, if any, to which payments relate to services rendered in the old year.

**258. Audit Notice of Unpaid Accounts.**—This is expected because Commonwealth parliamentary practice is to frown on year-end accumulations of accounts payable. Among the reasons are: (*a*) it is inconsistent with governmental 'cash' accounting; (*b*) grants of Supply should be for current costs, not past services; and (*c*) a 'slow-pay' repute may encourage suppliers to raise prices. Different means are applied throughout the Commonwealth to combat this risk. In New Zealand, for example, the Public Revenues Act authorizes the Minister of Finance to spend the equivalent of 1½% "of the total amount of all sums appropriated by the Appropriation Act for that year" to discharge requirements in excess of the provision in votes. In the United Kingdom it is expected that accounts be settled regardless of the effect on a vote, the reasoning being:

> if liabilities are postponed in one year, that practice may be repeated in the next, and thus not only would the evil grow, but the public service would suffer from the knowledge of contractors and tradesmen that payment of their accounts was liable to arbitrary postponement at the will of the department. (Public Accounts Committee, 1891)

This was reaffirmed by the 1950 Public Accounts Committee which declared that:

> payments which come within the provision made by Parliament, and which are due and fully matured, must not be postponed, even for the purpose of avoiding an excess.

**259.** Over-spending is specifically prohibited in Canada but departments are required to report commitments forthwith to the Comptroller of the Treasury, who is to earmark funds or to reject the department's request if he be of opinion that the vote cannot absorb the cost. The Canadian audit obligation therefore is to take particular notice of departmental practices in reporting contracts, etc., to the Comptroller and, at the year-end, to establish the extent to which unpaid accounts were carried forward. Should the amount be one of substance, attention is to be drawn in the Report. Likewise there is a duty to call attention whenever the amount outstanding is due to a vote having been ineptly computed. For example, more than once it has been noted to the House of Commons that the Government had failed to credit the Service Forces Pension Account with the full amount of its contribution.

## Part IV—The Accounting of Charges

**260.** The Executive is answerable to Parliament for the state of expenditure records and the House of Commons is to be informed should expenditures be imperfectly recorded. However, only in grave circumstances may it be anticipated that either Ministers or the Public Accounts Committee will weigh accounting disagreements. In these cases the Comptroller of the Treasury generally represents

the Executive and the Auditor General the House of Commons. It follows that in a variety of circumstances the Auditor General is expected to reach agreement with the Comptroller or departmental officers, as the case may be, although section 5 of the FA Act provides that:

**5.** (3) The Treasury Board may prescribe from time to time the manner and form in which the accounts of Canada and the accounts of the several departments shall be kept, and may direct any person receiving, managing or disbursing public money to keep any books, records or accounts that the Board considers necessary.

**261.** The Comptroller is responsible for the appropriation accounts, and it is these that are under audit. Expenditure accounts may also be kept by departments for purposes of administrative convenience but no examination need be made of these memoranda accounts.

**262.** The Auditor General has no responsibility with respect to detailed expenditure listings, etc., in the Public Accounts, although the summary statement listing the departmental totals of expenditures is certified. Section 64 of the FA Act provides that the Public Accounts include:

a statement, certified by the Auditor General, of the expenditures and revenues of Canada for the fiscal year.

It is this statement that is officially before him, with the nature of the audit certificate controlled by section 69 of the FA Act:

**69.** The Auditor General shall examine and certify in accordance with the outcome of his examinations the several statements required by section 64 to be included in the Public Accounts, and any other statement that the Minister may present for audit certificate.

**263. Allotments and Commitments.**—Section 29 of the FA Act requires departments to submit (through the Comptroller) to Treasury Board proposed allotments of votes and:

when approved by the Board the allotments shall not be varied or amended without the approval of the Board, and the expenditures charged to the appropriation shall be limited to the amounts of such allotments.

The purpose of section 29 being to provide to the Board a means to exercise general financial control, this is an administrative direction with the details of application of limited concern to the House of Commons—the total of vote charges being the prime interest of the House. However, it is legislation, therefore Treasury Board lacks the power to approve of an allotment that would be contrary to law. For example, it has been accepted that the section does not permit an allotment to establish a revolving fund with net costs, only, charged to the vote.

**264.** Another problem that may arise in the audit is where an Executive order or minute takes notice of a need of a department and indicates that provision will be made in the next Estimates for the cost. A consequence may be that some allotments are over-committed but, so long as actual expenditures do not exceed the vote, the matter is not of parliamentary audit interest because, as already stated, section 29 is essentially for an administrative purpose.

**265. Selection of Vote to Charge.**—It sometimes happens that an expenditure may be a permissive charge to more than one vote. In that event it is expected that thought be given to the possible future interest of Parliament. To illustrate, a British Appropriation Act included a vote for law charges and also one for construction work in connection with the Houses of Parliament. For the purposes of the latter vote, land was purchased and legal costs incurred in passing title. These costs could be a charge to either vote, so the view of the Public Accounts Committee was sought. Its preference was a charge to the construction vote:

> The advantage of such procedure would be that the facts would be so recorded that there would be no possibility of the charge being lost sight of, as part of the cost of the service, in case it became necessary to ascertain the actual cost, whereas if charged to the law vote it might escape the notice of anyone preparing a total cost statement in the future. (Durell, *Parliamentary Grants,* p. 421)

**266. Charging a General Vote in Lieu of a Specific One.**—Rarely, but sometimes, an auditor has under review a situation where the amount provided by a specific vote was inadequate and a general vote was charged. Assuming the text of the latter was sufficiently comprehensive, was that permissive? The Comptroller of the Treasury once refused to charge a general dredging vote for work in a harbour specifically provided for by another vote. He was overruled by Treasury Board and since then Audit Office practice has been to accept, provided: (*a*) a concurring Treasury Board authorization is of record, and (*b*) the parliamentary history of the specific vote does not indicate a deliberately imposed restrictive intent as to the amount that may be spent. Of course, it is not permissive to split the expenditures between the votes because that would have the same result as if virement had been used.

**267. Temporary Borrowings from Votes.**—Sometimes balances at credit of a general vote are temporarily used to provide for the needs of a specific one. Most frequently, this occurs during the period when departments are operating by means of interim supply. There are general "unforeseen" and "salary" votes controlled by Treasury Board and intended to provide funds in the event of such a contingency arising, but what is now being considered is the situation where some other general vote is temporarily charged. While such use is to be deplored because it weakens parliamentary control, situations do arise where it is in the public interest that something be done quickly. Provided suitable adjustments are made within the year, audit notice is not imperative. The reason is that it is the year-end accounts, not the monthly statements, that are certified and reported upon. However, it is regarded that no temporary use of vote credits is permissive or may pass unnoted should it violate a principle enunciated by the British Treasury and endorsed by the 1922 Public Accounts Committee:

> Money which is appropriated by Parliament to a specific vote or fund must not be diverted even temporarily to services outside the ambit of the vote or fund, since such a procedure cuts at the root of all control of expenditure through parliamentary appropriation.

**268. Virement.**—There must be parliamentary sanction before a permanent transfer may be made between votes. When consent is given, the legislative aim is: (*a*) to keep to a minimum the over-all total of an Appropriation Act and (*b*) to

obviate the submission of year-end supplementaries. It is generally accepted that, if permissive, virement may take place only when a need is urgent. To illustrate: in the United Kingdom the annual Appropriation Act includes a section which permits (with Treasury consent) virement between votes for the Navy, Army and R.A.F., respectively. In 1932 the Navy decided to buy a tug. No provision had been made in a vote but, by virement, the necessary funds were assembled and payment made. The Comptroller and Auditor General drew attention to the matter. The Public Accounts Committee readily agreed that as a business decision it was a good one, but considered payment by means of virement an irregularity:

> The authority granted to the Treasury in the Appropriation Act . . . is confined to expenditure which is not provided for, and which it may be detrimental to the public service to postpone until provision can be made for it by Parliament in the usual course. The suggestion that this condition of urgency existed in the present case has not been maintained . . .

The Treasury agreed that it had erred in authorizing the transfers and informed the Committee that, in future, the rule would be that no Service

> having larger funds at its disposal for one vote than are requisite for the service of the year, has any right to spend that surplus on another vote, even for the purpose of effecting a saving in the succeeding year, except under the conditions laid down in the Appropriation Act.

**269.** Canadian practice is to embody in schedules to the Appropriation Act any power to make transfers between votes. There is an audit obligation to draw attention to any case where a transfer is made without clear legislative sanction because the practice circumscribes parliamentary control of expenditures through particularizing purposes of votes. The experience of France will be used to illustrate: In 1861 the Minister of Finance secured legislation permitting transfers between votes because:

> I see in this the only practical and efficacious way to insure the continuation of public works during the absence of the legislative body.

The privilege was so freely abused that in 1871 a constitutional amendment prohibited the practice. Allix sums up the experience of the decade in these words (translation):

> It all amounted to an artifice, bound to end in disappointment. The number of supplementary appropriations was not thereby reduced; in fact, temporary transfers could not be expected to have that effect. The Government resorted to them simply to put off asking the Assembly for additional appropriations and to conceal the purpose. The requests were made after the money had been spent and for the account of services whose appropriations had been used to cover expenditures of other and entirely different services.
>
> This made parliamentary control quite impossible. As a matter of fact—and this is the most serious criticism it evoked—the transfer system was essentially destructive of budgetary specialisation. Appropriations by the Assembly of a specified sum to a departmental division became meaningless when the Government could, within the department, transfer funds from one division's votes to those of another. (*Traité Elémentaire de Science Finances et de Législation Financière Française*, pp. 247-8)

**270. Refunds to Votes.**—Services are sometimes performed for others on a basis that costs incurred will be reimbursed. Practice in some Commonwealth countries is to charge suspense accounts and in others to charge votes which are later credited with moneys received. The risk in the latter case is that the vote may be supplemented due to a reimbursement including costs for which provision was made in the vote. There was no binding Canadian practice until the FA Act took effect. Section 37 of the Act now provides that:

**37.** An amount received as a refund or repayment of an expenditure or advance and deposited to the credit of the Receiver General shall be included in the unexpended balance of the appropriation against which it was charged.

And Treasury Board has directed that the section be given this application:

(*a*) a recovery of an overpayment, a refund of an accountable advance, or a repayment for the cost of services rendered which, while coming within the ambit of the vote, had not been provided for in the Estimates, may be credited to the appropriation,

(*b*) a payment for a service rendered for which the appropriation was intended to provide and which is provided for must be credited to Revenue.

For example, when the Audit Office performs work for the United Nations Board of Auditors, Treasury practice is to refund to the Audit Office vote the reimbursement of travel expenses, etc., and to credit Revenue with reimbursements of salary costs.

**271.** A side problem is when a vote takes notice of an agreement under which any other public authority or person undertakes to bear part of a cost to be incurred. To illustrate, it will be assumed that a construction project is involved. If title in the work is not to be in the Government of Canada, the vote authorizes a grant. However, if the project is to be property of the Government and construction is supervised by a department, any money received is Revenue where the cost of the work is wholly appropriated. Conversely, where the net amount only is appropriated, any money received may be credited to a special account and later transferred to the vote under the authority of section 20 of the FA Act:

**20.** (1) Money received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to the provisions of any statute applicable thereto.

**272. Reserve Accounts.**—In principle, it is contrary to the interests of Parliament that a department or a public body financed by means of appropriations have a reserve account on which it can draw because that reduces the dependency of the Crown on grants of Supply. Therefore, legislation is a condition precedent to establishing a reserve. The British Public Accounts Committee once considered whether it was proper to permit a grant in aid to include a sum to be set aside as a contingent reserve. The body involved was the Imperial War Graves Commission which is wholly dependent on grants by Commonwealth Governments. The view of the Committee was:

It is contrary to the established practice of Parliament to increase annual expenditure by the creation of reserves against unforeseen emergencies ... the grant in aid of the Commission should, in accordance with ordinary usage for supply services, continue to be limited to current requirements, provision for emergencies ... being left for the consideration of Parliament if and when such contingencies arise. (1933 Reports)

**273.** In 1935 the same Committee considered the financial arrangements with respect to a suspension bridge, located in a colony and supported by tolls. When the bridge was operated by a semi-autonomous body, a portion of its funds was invested in Government securities and held in a reserve fund for special contin-

gencies and renewals. After the bridge became a departmental service with operating costs a charge to a vote, the Committee took exception to the continuance of the fund because:

> The accumulation of reserve funds to renew or replace wasting assets would provide the Department concerned and the Treasury with convenient sums of money which they would be able to spend at will.

The action taken was to sell the securities, close the account and credit Revenue. As a result, £106,677 was paid into the Exchequer Account.

**274.** A third case considered by the same Committee presents a different angle. In 1946 it was decided to establish a £37,500 account to provide benefits to Burmese hillsmen who had assisted Allied Forces during the war. It was to be administered by trustees to be appointed by the Burmese Government. The money was voted by an Estimate item and was at once deposited in a Rangoon bank, but trustees were not forthwith named due to a point of difference between the Governments. Three years later the Committee reported it was "surprised that it should have been thought proper to withdraw the money from the Exchequer before a body empowered to administer it had been duly set up". The Treasury agreed and caused the money to be repaid to the Exchequer "so that parliamentary authority will have to be sought if it is later proposed to establish a fund on lines similar to those agreed upon in 1946".

**275.** The foregoing types of cases would be exceptional in Canadian practice but are of audit interest because, among other reasons, the point may have to be considered whenever a report is called for under section 71 of the FA Act:

> **71.** The Auditor General shall, whenever the Governor in Council, the Treasury Board or the Minister directs, inquire into and report on any matter relating to the financial affairs of Canada or to public property and on any person or organization that has received financial aid from the Government of Canada or in respect of which financial aid from the Government of Canada is sought.

In such an event, there would be an obligation to take notice of any reserves that the organization might have.

**276. Unofficial Reserves Created by Holding Cheques.**—A problem sometimes encountered in an audit is where a vote is charged without intent to release the cheque in the year of date. Since the cheque represents an official reserve, the action taken is objectionable. Moreover, it is contrary to the direction that balances at credit of votes shall lapse at the fiscal year-end. Finally, the action gives rise to a risk of misapplication or misappropriation. For these reasons, it is regarded that any such action by a department is irregular; at the same time it is accepted that, in special circumstances (*see* paragraph 279), Treasury Board may authorize a cheque to be held.

**277. Reserve for a Matured Liability.**—Cases sometimes present themselves where a vote was obtained for a purpose with the expectation that the aim would be achieved and final payment made within the year. When these expectations

are not realized, is it permissive to establish an open account and thus obviate the necessity of securing a new vote? The New Zealand Public Revenues Act makes provision for such a contingency:

> Where provision has been made in any Appropriation Act for expenditure in the nature of a grant or for a purpose that does not normally recur, but the expenditure cannot be made during the financial year to which that Act relates, the Minister of Finance, on being satisfied that it is desirable to do so, may direct that any unexpended balance of the provision shall be transferred during that financial year to a separate fund, account, or deposit account to be held there until payment is required, when the amount may be expended without further appropriation than this section for the purpose for which it was originally appropriated by Parliament.

Australia has legislation to the same end but differing in form and ambit. There is no like Canadian legislation. Parliaments of Commonwealth countries having decided the subject to be one within the legislative field, Audit Office opinion is that neither the Governor in Council, Treasury Board nor the Comptroller of the Treasury may sanction any scheme to convert a lapsing balance into a reserve.

**278.** A roundabout way sometimes adopted to achieve the end is to make a payment on account with the understanding that the other party will refund to the extent that money is not earned. Audit Office opinion of a payment of this sort is conveniently stated by Durell:

> Generally speaking, . . . payments should not be made, except in very special cases, until the conditions entitling the contractors to receive such payments have been fulfilled, especially as there is a natural tendency at the close of a financial year to make advances or payments on account rather than to have to surrender a balance and increase the burden of a subsequent year. (*Parliamentary Grants,* p. 409)

**279.** A recognized special exception is where the money has been earned but for some reason or other a cheque may not be drawn and delivered. Examples include cases where an engineer's certificate may have been delayed or lost in transit, or a contractor dies or becomes a bankrupt in proximity of the year-end, etc. Because the debt has matured, in suitable circumstances no audit exception need be taken to charging the vote and holding the cheque, provided that is done with the concurrence of Treasury Board.

**280. Date of Delivery.**—Section 32 of the FA Act requires that applications for payments be supported by a certificate to the effect

> that the work has been performed or the material supplied or both, as the case may be, and that the price charged is according to contract, or if not specified by contract, is reasonable.

A question sometimes is whether deliveries of equipment, supplies, etc., may be certified when they are in transit, still on the premises of the supplier or at some place other than that specified in the contract. Section 32 is directory and it has long been accepted that, where for unforeseen reasons delivery may not be made within a fiscal year, a technical delivery is permissive for the purposes of the section. An Executive authorization is necessary but even such an authorization is ineffectual if the real aim be that of charging a new year's need to a lapsing vote. Montpetit's *Les Cordons de la Bourse* provides an illustration of a correct authorization. Structural steel was fabricated in accordance with contract

at Winnipeg and was ready for delivery in March, but unusual climatic conditions made it impracticable to ship to the designated point of delivery in the north country. The Governor in Council concurred in an arrangement whereby delivery might be taken at the plant upon the contractor segregating the steel, etc.

**281. Selection of Payee.**—The Crown, like every other debtor, has a duty to make certain that a claimant is the person entitled to the money. For example, when a United Kingdom department requisitioned a land roller and paid the person in possession (who was not the owner) the department was ordered by a court to pay the owner forthwith without regard to its chances of recovering the amount already paid.

**282.** Where a doubt exists as to the person entitled, the appropriate action of a department is to make use of section 24 of the Exchequer Court Act, c. 98, R.S., which provides that in such circumstances a Judge may allow a payment into that Court, whereupon:

> the Crown is *ipso facto* released and discharged from any and every liability whatsoever regarding the moneys so paid into Court, and any person claiming to be entitled to the whole or any share of the moneys so paid in is at liberty to institute an action in the Exchequer Court by way of petition for the recovery of the same . . .

**283. Gifts of Public Property.**—The capacity to make gifts of public property is reviewed in the chapter on Public Property accounts. What is now of concern is the question: Should a gift of public property be recorded as an expenditure? It has been said:

> The constitutional principle of parliamentary control over expenditure is equally applicable to gifts in the name of, or on behalf of the Crown, whether of stores or money, and public departments are not at liberty to give away stores without the sanction of Parliament, prior or subsequent. (Todd, *Parliamentary Government,* Vol. II, p. 198)

This does not refer specifically to accounting, but parliamentary control through charging a vote is employed in the legislation (c. 5, Statutes 1950-51) granting authority to make gifts of military equipment to NATO countries.

**284.** Where the property forms part of a statutory stores account subject to the provisions of Part V of the FA Act, a charge must be made to a vote to keep the account in balance. Therefore, the problem narrows itself to stores, etc., not subject to monetary valuation for control purposes. It is the Office view that the interests of the House of Commons may be reasonably regarded as safeguarded when the British practice is followed: No charge need be made to a vote unless an immediate replacement is necessary, in which event a charge is to be made to a vote with a Revenue item resulting; however, the Auditor General frequently calls attention to any substantial gift made without charging a vote.

**285. Capital and Operating Charges.**—The Appropriation Act sometimes lists more than one vote for the same service: one to provide for current operating and maintenance costs and another for expenditures in the nature of capital outlays. When this happens, an implication is that Parliament expects that recognized accounting principles, differentiating between ordinary and capital expenses, be applied, even though all outlays are written off as expenditure of the year in which

incurred. Broadly stated, a vote for construction, acquisition of land, equipment, etc., should be charged with expenditures made for the purpose of acquiring assets of a permanent nature, and the other vote with expenditures incurred in maintaining capital assets in a state of efficiency. No depreciation account being associated with the services now referred to, another problem may be the cost of major repairs and replacements — normal repairs and small renewals are, of course, operating charges. The Audit Office view is that it is desirable that all major capital outlays be charged to the 'capital vote'; but public needs take precedence over niceties of accounting, therefore in the event of a major accident or unforeseen situation arising, audit exception is not automatically taken to a charge on the operating vote, but the case is to be thoroughly reviewed and noted in the auditor's papers.

**286. Treatment of Penalty Receipts.**—*Prima facie,* any moneys derived from the imposition of penalties are Revenue credits, but when collected by means of a set-off a limited discretion is regarded in the audit as enjoyed by departments. To illustrate, it will be assumed that a works contract provides that the contractor be subject to a penalty of $100 a day for each day in default in completing the contract, that he fails to complete by the date stipulated, and that the amount is deducted from a progress payment claim. A ruling of the law officers in 1935 to the Comptroller of the Treasury was:

> if the money otherwise payable to the contractor is held by way of security deposit and is forfeited, it should be deposited to revenue, but if such money is not so held, and the forfeiture is in the nature of a penalty under the provisions of the contract affecting the contract price, then such sum should remain to the credit of the appropriate vote.

Since then, section 40 of the FA Act has been enacted. It is the Audit Office practice to assume that within the year adjustments may be made in that year's credits to a special holdback account, but were a penalty settled out of a holdback credit originating in an earlier year it would be a Revenue credit. On the other hand, levy of a penalty by withholding the amount from a contract payment may be regarded as an adjusting of contract price—reducing cost but not creating Revenue.

**287. Power to Establish Special Accounts.**—It has been noted elsewhere that it was not until the 1931 legislation that action was taken to regulate the practice of setting up special accounts. The 1920s brought into being quite a number of special accounts for the purpose of applying various statutes with the only authority so to do being provisions in the statutes giving the Governor in Council power to make regulations "prescribing the accounts to be kept and their management" or phrases of like purport. As operations of a special account mitigate the influence of legislative financial controls, the Audit Office view is that legislative authority to establish a special operating account for the purposes of a statute should be clearly stated and that a few special accounts now existing have questionable status. However, these have an operating history of over a quarter of a century and are known to Parliament (by reason of annual references to them in the Public Accounts), therefore they are accepted in the audit as permissive but are not regarded as having established a precedent.

**288. Revolving Funds and Advance Accounts.**—The accounts now referred to take different forms and exist for varying needs. They include, for example, such long established accounts as the Coinage Accounts of the Mint and the Queen's Printer's Advance Account as well as the more recently established stores revolving accounts resulting from the application of Part V of the FA Act. However, regardless of purpose, they have one thing in common: they are working capital advances and sums employed must be kept intact by reimbursements from votes or other sources; no expenditure may be made a final charge to them.

**289.** A revolving fund being authorized to facilitate administration, profits earned in operation become Revenue credits, unless some special provision for retaining the money is made in the governing statute.

**290.** The Department of Finance has the general financial responsibility with respect to the state of revolving fund accounts, but Commonwealth practice is to assume that there is an audit obligation to call attention to any case where opinion is that: (*a*) the investment in stores, commodities, etc., is obviously far in excess of administrative need, or (*b*) the liquidity of the account is impaired by reason of obsolescent holdings, or (*c*) the account has been used for purposes not within the ambit of the statutory authorization.

**291. Land Acquisition Accounts.**—Among votes listed in schedules to Appropriation Acts is a group under the heading "Loans, Investments and Advances". They differ from ordinary votes in that they produce assets of the type set out in the Statement of Assets and Liabilities. Occasionally such outlays are for the acquisition of land, an illustration being that of the Department of Transport in acquiring in advance of immediate need land for airport development or for purposes of water navigation. There is no statutory limit on the total but purchases are controlled by amounts voted. When land thus acquired is to be used to expand an airport, the land investment account is relieved by a charge to a vote. On the other hand, if land be sold because it is no longer required for airport purposes, the land investment account is credited with the cost originally charged thereto with any profits credited to Revenue and any losses charged to a vote. No expenditure may be made a final charge to an investment account. For such reasons, notice is to be taken in the audit of departmental accounts where: (*a*) an account has not been adjusted to reflect property put into use, or (*b*) the liquidity of the account has been impaired through losses, or (*c*) the property involved has been converted to a use outside the ambit of the authority given by the Appropriation Act or other legislation.

**292. Treatment of Investment Items Charged to Expenditure.**—To illustrate, it will be assumed that a vote for the acquisition or improvement of buildings has been charged with the cost of shares purchased in a company operating a building—this is sometimes a condition associated with tenancy of an apartment, etc. Audit interest is in the administrative action to make certain a proper control is established to the end that the Crown's equity and entitlement to any distribution of profits or capital is not overlooked.

**293. Debts Due to the Crown.**—Parliament alone has authority to write off debts so no department has authority to delete an account receivable resulting from a service rendered at public cost, but the Governor in Council may to the extent permitted by section 23 of the FA Act:

> **23.** (1) The Governor in Council, on the recommendation of the Treasury Board, may, if he considers it in the public interest, delete from the accounts, in whole or in part, any obligation or debt due to Her Majesty or any claim by Her Majesty,
>
> (*a*) that does not exceed five hundred dollars and has been outstanding for five years or more, or
>
> (*b*) that does not exceed one thousand dollars and has been outstanding for ten years or more.
>
> (2) The obligations, debts and claims deleted from the Public Accounts under this section during any year shall be reported in the Public Accounts for that year.

The parliamentary history of this section is reviewed in paragraphs 111-3 of the chapter on Revenue. The words "Public Accounts" appear to be used in this section to indicate different things: first in (2) with respect to official accounts generally, and later to the volume referred to in section 64 of the Act, because amounts related to "any claim of Her Majesty" in subsection (1) are not ordinarily listed in the volume laid before the House of Commons.

**294.** Cases are sometimes noted where a payment was made without authority and an Executive order subsequently authorized a department 'to suspend' efforts to recover—the obvious intent being to have the balance written off as uncollectable. The Office view is that the Crown enjoys no power so 'to bury' financial errors of this type, the appropriate action being either to recover or to regularize. As to the latter, where the breach is of a rate fixed by Executive order, it is regarded in the audit as permissive to make a new order amending the rate in the period of overpayment and thus adjust the account. Where recovery is not made nor action taken to regularize in legal manner, a direction 'to suspend' efforts to collect has Report significance.

## Part V—Statutory Grants

**295.** Various statutes authorize payments 'out of unappropriated moneys in Consolidated Revenue Fund' or 'out of Consolidated Revenue Fund'. They mean the same thing—the words 'unappropriated moneys' simply take notice of the fact that the B.N.A. Act makes certain appropriations for provincial subsidies, etc., so in theory they are first charges. Either phrase permits payment without further appropriation. On the other hand, where the text states that the costs are to be paid 'out of moneys provided by Parliament' a vote is a necessity before paying. Generally, the power to charge unappropriated moneys is given when (*a*) it is desirable that the payment be removed from the arena of politics (the salary of the Governor General is the outstanding example), or (*b*) annual requirements cannot be accurately forecast.

**296.** It has already been noted that statutory grants are not made to the Crown but to provide for the attaining of the objects and aims of a piece of

legislation (*see* paragraph 203). Therefore, departmental discretion in applying a statutory grant exists only to the degree that the pertinent statute permits. In an earlier paragraph (*see* paragraph 217) a decision was noted where the Judicial Committee of the Privy Council had concurred in an opinion expressed in the court below that it "would be dangerous to allow a loose construction" of the statutory grant then at issue. What is the intent of an Act is a question of law and an English judge once rather caustically remarked:

'Intention of the Legislature' is a common but very slippery phrase, which, properly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it...

Nevertheless, section 70 of the FA Act requires that the Auditor General call attention to every case observed in the course of audit where:

any appropriation was exceeded or was applied to a purpose or in a manner not authorized by Parliament

and the definition section of the FA Act includes this:

"appropriation" means any authority of Parliament to pay money out of the Consolidated Revenue Fund.

**297.** Auditors having a special and troublesome task when a doubtful charge is observed, the essential is to consider the Act as a whole and to avoid reading too much into the appropriating section. Two illustrations are now given; one because it is a sample of legal interpretation and the other because it was influenced by constitutional considerations.

**298.** The first case turns on the meaning of section 34 of the Expropriation Act, c.106, R.S. It reads:

**34.** The Minister of Finance may pay to any person, out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any sum to which, under the judgment of the Court, in virtue of the provisions of this Act, he is entitled as compensation money or costs.

Land was expropriated and proceedings to fix the compensation commenced in the Exchequer Court. The parties reaching agreement by direct negotiation, application was made for a formal entry of judgment by the Court. The President refused, holding that the parties were not seeking an adjudication as to value but were asking the Court to give judicial sanction to an arrangement already made in order to obtain the benefit of the appropriating section of the Act:

...they should not ask the Court to become merely an instrument of convenience to them for the purpose of overcoming difficulties or delays of government departmental arrangements.

It was held that, to permit the statutory spending authority to be employed, the section

contemplates a judgment of the Court, in virtue of the provisions of the Act, based upon an adjudication by the Court as to the compensation money to which the defendant is entitled. (*King v. Hooper*)

**299.** The second case is drawn from parliamentary records. Section 42 of the Senate and House of Commons Act, c.249, R.S., as amended, reads:

**42.** To the member occupying the recognized position of Leader of the Opposition in the House of Commons, there shall be paid in addition to his sessional allowance an annual allowance of fifteen thousand dollars.

There is a comparable text in a British Act and the illustration is with respect to it. In May 1940, the British Army was falling back on Dunkirk, an invasion of England was in prospect and a National Government was organizing defences of Britain; nevertheless, on 21 May a Member of Parliament rose and asked Mr. Churchill if it was his intention to introduce legislation to suspend payment of the statutory allowance to the Leader of the Opposition. Mr. Churchill replied:

> In view of the formation of a Government embracing the three main political parties, His Majesty's Government is of opinion that the provision ... relating to the payment of a salary to the Leader of the Opposition, is in abeyance for the time being. As at present advised, I do not think that amending legislation as suggested is necessary.

The reply was not accepted as being wholly satisfactory because no parliamentary assembly remains unanimous—sooner or later some Member becomes a recognized leader of criticism. The matter was dropped after the Speaker pointed out that the key word was "Opposition": under the British constitution, to have an Opposition there must be a party in opposition from which an alternative government could be formed. Therefore, if there were no opposition party, there could not be an Opposition Leader within the meaning of the legislation.

**300. Alternative Accounts Available to Charge.**—Although a statute fixes the amount that may be spent for the purposes of the legislation, it has happened in years gone by that provision was made in an Appropriation Act for the same purpose. Should a like vote again be under audit, unless the text clearly indicates that the intent is to supplement the statutory grant, the annual vote is to be regarded simply as a budgetary item inserted to indicate the probable expenditure in the year. Thus, no expenditure should be recorded as a charge to the vote.

**301.** A converse situation could arise, for example, were a construction vote to provide specifically for the cost of site and the land is acquired by expropriation. In these circumstances, it would be obligatory to call the attention of Parliament were the cost charged to unappropriated moneys by relying on section 34 of the Expropriation Act (*see* paragraph 298 for text). Parliament has enacted that the Canadian Broadcasting Corporation, for example, may resort to the Expropriation Act but "the amount of any judgment upon such proceedings shall be payable out of the funds of the Corporation" (section 11, Canadian Broadcasting Act, c.32, R.S.). Therefore, it is to be regarded in the audit that when an annual vote provides for the cost of a public work, that vote may not be supplemented by a sidewind. Of course, where such a vote makes no specific reference to the cost of site, no supply vote is made for purchase of the land, and an expropriation judgment results, the payment may be out of unappropriated moneys.

**302.** Sums are listed in the Estimates and prefaced by "S" (statutory) but no corresponding amount is included in the Appropriation Act. This listing has no Appropriation Act significance and is done to present to the House an estimated grand total of the expenditures in the coming year. Inclusion in the Estimates does not limit the amount that may be spent because that is controlled by some other statute. For these reasons, there is no audit interest in such listings in the Estimates book.

**303. Charges to Statutory Funds and Accounts.**—Whenever Parliament creates such an account, it is assumed in the audit that the Government enjoys no discretion (other than what the legislation permits) in the selection of charges. To illustrate, the Post Office Guarantee Fund will be used. In reporting on 1949 accounts the attention of the House of Commons was drawn to a practice of Post Office of charging this statutory fund with adjustments of losses where no employee of Post Office had acted improperly. The Public Accounts Committee considered the matter and reported:

> The Post Office Guarantee Fund was established in 1898 "to remove the necessity for commercial bonds of indemnity being contracted for by various individuals", and its statutory purpose is to make good losses arising from "the malfeasance, misfeasance, or failure to duly discharge his duties" of a post office employee. The practice has developed of charging the Fund with outlays that have nothing to do with its aims. Your Committee is of the opinion that indemnities and compensation paid as a result of losses occurring in the handling of various classes of mail, settlements for losses by burglary, losses arising from money order forgeries, losses arising from fraudulent savings bank withdrawals and the like should be treated as operating costs of the Post Office Department and not charged to the Guarantee Fund. (Third Report, 1950 Session)

## Part VI—Governor General's Special Warrants

**304.** It probably is apocryphal, but 'tis said that at one time senior Finance officers were expected, on the day a session was to open, to report for duty in morning dress, with top hat, spats, etc. The reason was that the Governor General's sleigh might be stopped outside the gates to Parliament Hill while they held last minute warrants for him to sign. Nowadays, a warrant is rarely used to authorize a payment, but the Auditor General is required to report whenever "a special warrant authorized the payment of any money" (section 70 of FA Act). The authority to issue these warrants is given by section 28 of the same Act:

> **28.** (1) Where an accident happens to any public work or building when Parliament is not in session and an expenditure for the repair or renewal thereof is urgently required, or where any other matter arises when Parliament is not in session in respect of which an expenditure not foreseen or provided for by Parliament is urgently required for the public good, the Governor in Council, upon the report of the Minister that there is no appropriation for the expenditure, and the report of the appropriate Minister that the expenditure is urgently required, may order a special warrant to be prepared to be signed by the Governor General authorizing the payment of the amount estimated to be required for such expenditure.
>
> (2) A special warrant issued pursuant to this section shall for the purposes of this Act be deemed to be an appropriation for the fiscal year in which the warrant is issued.
>
> (3) Every warrant issued under this section shall be published in the Canada Gazette within thirty days after it is issued, and a statement showing all warrants issued under this section and the amounts thereof shall be laid by the Minister before the House of Commons within fifteen days after the commencement of the next ensuing session of Parliament.
>
> (4) For the purposes of this section Parliament shall be deemed to be not in session when it is under adjournment *sine die* or to a day more than two weeks after the day the accident happened or the other matter arose.

**305.** *Subsection* **(1).** Words that may present an audit problem are "any other matter". In 1896 Parliament was automatically dissolved by reason of five years having elapsed since a general election. Supply for the new year (then

starting on 1 July) had not been granted and after the election a question was whether warrants could issue to pay civil service salaries. The new Prime Minister requested an opinion from the Minister of Justice who replied that:

> I think that the payment of the employees mentioned in your letter is 'urgently and immediately required' for the public good, within the meaning of the said enactment, and that, under the circumstances which have occurred, and the consequent present condition of public affairs, the Governor in Council may properly on the reports mentioned, order a special warrant to be prepared to be signed by the Governor General, for the issue of the amount estimated to be required.

This opinion has since been relied upon for the issue of special warrants for all administrative services during general elections called before full Supply for the year has been granted.

**306.** The subsection requires that the Minister of Finance certify that there is no appropriation available to which may be charged the expenditure to be authorized by the warrant. As the FA Act defines "appropriation" to mean any authority to pay money out of the Consolidated Revenue Fund, an audit task is to check all statutes making provision for direct charges on the Fund. For example, the Fire Losses Replacement Account Act, c. 28, Statutes 1953-54, makes $5,000,000 available:

> to restore, rebuild or repair any property lost, destroyed or damaged by or in consequence of a fire.

**307.** *Subsection* **(2).** Significant words are "for the fiscal year". Years ago it was regarded that a Governor General's warrant was the equivalent of a statutory grant without time limit. The present text results in the warrant expiring on 31 March but it is assumed that, like a vote, it may be charged during April with payments made of accounts that matured before 1 April.

**308.** A warrant may issue only when Parliament is not in session (as defined in the section) and there is a court decision to the effect that a warrant may be founded only on a need that arose afterwards. A special session of the Assembly of a colony about to form part of South Africa ended with a resolution declaring that, for indemnity purposes, it be regarded as an ordinary session. No appropriation was made to meet the extra cost but, after prorogation, a warrant was issued. The court declared:

> Even if the Governor were able to come to the conclusion that this extra payment... was necessary in the public interest, yet the fact would remain that the necessity arose while the House was in session, and should have been dealt with in Parliament by means of a bill. Necessary expenditure cannot be met by special warrant, unless it occurs when Parliament is not in session; the terms of section 20 of the Act are perfectly clear upon that point. The breach of the law has therefore been proved. (*Dalrymple v. Colonial Treasurer*)

**309.** In 1955 the Auditor General of South Africa drew attention to a novel point: An emergency caused work to be started on 6 June, application was made on 6 August for a warrant and it was granted on the 25th; in the interval, £2,931 had been spent. This was reported to Parliament as "unauthorized" because the authority of a warrant runs from the date it was issued. Parliamentary action was considered necessary to regularize.

**310.** *Subsections* **(3)** *and* **(4).** A failure to publish would not be regarded in the audit as making a charge to a warrant illegal.

**311.** The purpose of **(4)** is to provide for situations where Parliament adjourns, rather than prorogues, and the adjournment is for a lengthy period.

## Part VII—Appointments, Salary Charges, etc.

**312.** Where legislation provides that appointments be made "in the manner authorized by law" that generally means in accordance with the provisions of the Civil Service Act. There are, of course, certain prerogative appointments, the ranking one being the Prime Minister; others include ambassadors and Service Force officers. In the event that a statute does not indicate how appointments are to be made, a presumption is that section 131 of the B.N.A. Act applies:

> **131.** Until the Parliament of Canada otherwise provides, the Governor General in Council may from time to time appoint such officers as the Governor General in Council deems necessary or proper for the effectual execution of this Act.

The words "other than powers of appointment" in section 5(2) of the FA Act indicate that Treasury Board is not to be regarded as empowered to make appointments in lieu of the Governor in Council.

**313.** While the Civil Service Act vests most appointments in the Civil Service Commission, it may, with the consent of the Governor in Council, exclude positions from provisions of the Act. The Commission being a statutory body, its appointments must be evidenced by formal certificates, and in the audit these are accepted as signifying that the appointments were regularly made. Whenever the Civil Service Commission causes a position to be declared outside its jurisdiction, a consequence is that the Commission cannot later reverse itself.

**314. Appointments in Anticipation of a Statute Taking Effect.**—The authority to make necessary appointments and to make salary payments is section 12 of the Interpretation Act, c. 158, R.S. In part, it reads:

> **12.** Where an Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment . . . that power may, unless the contrary intention appears, so far as may be necessary or expedient for the purpose of making the Act effective at the date of the commencement thereof, be exercised at any time after the passing of the Act . . .

**315. Action by Vote Reference.**—Where a person is specifically named or identified in a vote for appointment, a power so to appoint is normally thereby vested in the Governor in Council notwithstanding the provisions of any statute.

**316.** When Estimates Details provide a special salary rate but the vote text does not enact, the Government is simply giving notice that it may take appropriate steps to put a rate into effect. No entitlement to the money is thereby created nor is the Government given authority to override the statute that controls the position.

**317. The Power to Pay.**—Appointment to or reclassification of a position does not automatically establish a right to payment:

The basis for salary is an appropriation, and if there is no appropriation or authorization to pay the salary, the fact that the position is established by law and that a person has been appointed to fill the position does not entitle him to a salary payment. (Field, *Civil Service Law*, p. 105)

**318.** Where a rate is fixed by statute, it automatically becomes applicable without mention in the appointment order, but if no rate is specified in the legislation the individual is dependent on the bounty of the Executive. To illustrate, a lawyer sought compensation for services rendered as a commissioner appointed under the Inquiries Act. He failed because the statute made no provision for compensation, therefore:

it is clear that the service was not rendered in virtue of any contract, but by virtue of an appointment under the statute, and no provision being thereby or otherwise made for the payment of the Commissioner for his services as such Commissioner, no promise on the part of the Crown to pay therefor is to be implied from the appointment and from the rendering of such service. (*Tucker v. The Queen*)

**319.** Should a person agree to take an appointment at less than the rate fixed, a question of principle is present because, as was pointed out in the United States:

It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed, but will not come for less. (*Miller v. U.S.*)

**320. Effective Date.**—Unless the taking of an oath is a condition precedent to the taking of office, a person who is duly appointed may be paid salary before the oath is administered. In the absence of a specific direction as to the starting date for pay purposes, the date of the appointing order or certificate is of importance because, by section 11 of the Interpretation Act:

the same shall be construed as coming into operation immediately on the expiration of the previous day.

There are, of course, exceptions, a common one being when a 'temporary' civil servant is given permanent appointment with retroactive effect and the rate is lower than that paid previously. No refund need be made because (*a*) the original payments were lawfully made, and (*b*) it is generally accepted by textbook writers that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.

**321. Holders of Offices.**—A distinction sometimes exists between those holding an office recognized by law and those holding an appointment to a position in an administrative establishment. It seems that, in law, the holder of an office is continuously answerable for the due performance of the functions of the office whether he be present or not, consequently:

The incumbent of an office is *prima facie* entitled to the lawful compensation thereof so long as he holds the office, though he may be disabled by disease or bodily injury from performing its duties . . . If the appointing power suffers him to continue in office, notwith-

standing the disability, he is entitled to the compensation. This right may be cut off by law or regulation authorizing it, but not by the act of the appointing power without the authority of law or regulation. (*Sleigh Case*)

On the other hand, if the position is an Establishment one, regulations regarding leave, etc., apply. Should he have particular responsibilities, 'officer' is more appropriate than 'clerk' — a court once remarked, when seeking the appropriate category for a man working in an office for a salary of £175, that he was "in no sense a public character".

**322. Superannuation Contributions.**—The Public Service Superannuation statute provides that contributions to the Superannuation Account are to be made by "reservation from salary or otherwise". The words "or otherwise" are new, but ordinarily:

There is no obligation on the man to pay, but there is an obligation on him to permit the deduction from his annual wages of the amount required for the superannuation fund. (*Tees Conservancy Commissioners v. James*)

In other words, failure to deduct is an omission for which the paying office is answerable; subject to surrounding circumstances, it need not adversely affect the rights of the individual concerned.

**323.** Any general failure to deduct is a Report subject because neither the Executive nor the employee may contract out of a statutory pension scheme. Such an attempt was made by a British Public Authority, the Salford Guardians, which was subject to a scheme akin to the Canadian Public Service Superannuation Act. It decided to ignore, for contributions and award purposes, certain special payments to staff that fell within the definition of 'salary'. While the staff, generally speaking, were in agreement, exception being taken the matter went to the courts and it was ultimately decided that the Guardians had no such power because it would mean that it would be:

in the option of the boards of guardians to determine whether or not this statute shall apply, and they can (as one of the learned Lord Justices said) make the statute a dead letter. I cannot think that that was the intention of Parliament. It rather appears to me that by using the imperative terms . . . Parliament has indicated an intention that the Act shall apply notwithstanding any agreement to the contrary. (*Salford Guardians v. Dewhurst*)

**324. Contributors' Rights.**—Contributions are not held in trust for the contributor; they become public money. The rights a contributor has are those set out in the legislation, but if a deduction was made in error a refund should be forthwith made. Otherwise, the situation seems to be that stated in a South African case:

The contributions to the pensions fund are obligatory; a member is not entitled to elect whether he will pay or not. He must pay, and as soon as he has paid the money ceases to belong to him. It becomes part of the fund which is controlled as prescribed by the Act, and the person paying in the contribution has no share in that control—the identity of the individual contributions is lost; they are merged into the fund. It cannot in any sense be said that the money paid into the fund remains the money of the person paying it in. His only interest in that fund is that he may be entitled to get out of it such moneys as may be prescribed by the Act in particular circumstances. (*Wiehman v. Commissioner of Pensions*)

**325. No Special Agreements Permissive.**—A promise to treat a person as a contributor or to award a pension on a certain basis is without legal effect. For



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example, some British civil servants claimed that they had been induced to enter the civil service by a Treasury promise that, when pensioned, it would be on a certain basis. This was not done, so they litigated but failed:

> If you find that the statutes give the Lords of the Treasury a discretion, that is their power and their only power. They might by contract possibly involve themselves in personal liability, but they never could involve the Crown because they are not authorized to make any such contract. (*Nixon Case*)

In other words, if an exception is to be made, legislation is necessary.

**326. Service Forces' Pay.**—In England an annual Act fixes the number of soldiers that may be enrolled. This stems from a clause in the Bill of Rights against raising or keeping a standing army in time of peace without the consent of Parliament. No annual legislation is necessary in Canada because section 16 of the National Defence Act, c. 184, R.S., declares that the number of officers and men in the regular forces and in the reserve forces "shall be as from time to time authorized by the Governor in Council". The same Act vests in the Minister of National Defence the power to divide the naval, army and air forces into such "units and other elements" as he may see fit, but the maximum number of persons in each rank and trade group is, by section 23, to be prescribed by regulations of the Governor in Council. Section 36 directs that pay and allowances:

> shall be at such rates and issued under such conditions as are prescribed in regulations made by the Governor in Council.

**327.** In the event of an overpayment, it is regarded that a more extensive discretion to omit recovery action is enjoyed than is the case where a civilian is overpaid. The justification is the special constitutional relationship existing between the Sovereign as Commander-in-chief and Service Force members. This has the effect of modifying normal relationships between the Executive and Parliament in so far as the routine of internal management of the Forces is concerned. Neither a Minister nor a service officer, regardless of rank, may direct write-off of an overpayment, but it may be regarded in the audit that the Governor in Council may regularize. (*See* also paragraph 294).

## Part VIII—Travel and Removal Expenses

**328.** A Commonwealth auditor general is traditionally expected to consider the 'merit' or reasonableness of expenditures and, in proper circumstances, to comment when of opinion that there has been wilful or careless disregard of the public interest in the spending of public funds. For example, in commenting on the obligations on the British Comptroller and Auditor General, Mitchell remarks:

> The original intention under the Act of 1866 was that the Comptroller and Auditor General should examine only as to due authority, proof of payment and proper accounting. Subsequently Select Committees on National Expenditure have favoured a wider discretion in his reports, and in practice he now draws attention to uneconomical spending. This practice, a reply to the cry that departments need only spend appropriately—that is, on approved services—without having to exact value for money, is still open to the criticism that the Audit staff is not in as good position as the departments themselves to judge what is economical or uneconomical. But still it is possible to compare the amount spent and results obtained by different departments for the same kind of service. This possibility leads naturally to a levelling up of spending efficiency among departments. (*State Finance*, pp. 82-3)

A statutory obligation on the Canadian Auditor General is to call attention to any expenditure "not authorized by Parliament" and a reckless extravagance comes within that.

**329.** What is now being considered is the audit responsibility when it seems that meal costs, taxis, tips, etc., claimed and allowed were higher than normal or necessary. Long-established practice is to call Parliament's attention only to extraordinary cases. One reason is that the controlling rules are non-statutory, but the more important is that, no names being associated with a Report observation, a Minister will be regarded by the public as responsible although personally wholly unaware of the matter. In fairness to all, Office practice is to draw such charges to the notice of the deputy head directly concerned and to the Comptroller of the Treasury. If appropriate action is not taken and the matter is regarded as serious, the Auditor General next brings the charges to the notice of the Minister of the department and sometimes to that of the Minister of Finance, partly because of his general responsibility with respect to Executive financial rules and partly because the matter may have an association with section 89 of the FA Act. The section is an old one, rarely applied and rather vague, but it does say:

> **89.** (1) Whenever the Minister has reason to believe that any person
> (*b*) has received money for which he is accountable to Her Majesty and has not duly accounted for it, or
> (*c*) has in his hands any public money applicable to any purpose and has not duly applied it,
>
> the Minister may cause a notice to be served on such person . . . requiring him . . . duly to pay over, account for, or apply such money, as the case may be, and to transmit to the Minister proper vouchers that he has done so.

Only after the Ministers have had reasonable opportunity to consider and take whatever action they regard as appropriate is it Office practice to consider the charges from the viewpoint of Report significance.

**330.** It is, of course, regarded in the audit that both the claimant and the officer who accepted the accounting are liable to make good should superior authority disallow all or any part of the amount paid.

**331. Official Station.**—Every civil servant has an official station and it is regarded that the boundaries of the place are those of the metropolitan area rather than those of a particular municipality. For travel status purposes, a civil servant having Ottawa as his station is not in travel status when business takes him to Hull, and the same rule is applicable to Toronto, Montreal, etc.. when a civil servant is required to go to one of the suburbs. He may be reimbursed for exceptional costs, but as an administrative rather than a travel expense.

**332.** Expense claims must be related to the performance of official business. The illustration now given did not involve a civil servant — the matter at issue was the expense items deductible from gross income to establish the tax liability of a lawyer — but it draws a line of division:

> In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is



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his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession . . . and this is so whether he has a choice in the matter or not. It is a living expense as distinct from a business expense. (*Newsom v. Robertson*)

**333.** When a civil servant is transferred temporarily from one place to another — for example, to act as substitute for an officer who is absent — the risk is present that, if the stay be prolonged, living allowances paid become, in fact, additional salary. It is for this reason that reimbursement of expenses over an extended period may necessitate audit notice.

**334. Per Diem Allowances.**—When a per diem is fixed by a statute and no direction is given with respect to fractions of a day, it is discretionary with the department administering the vote to be charged whether notice be taken of fractions of a day, because the law normally does not take notice of a fraction. When fixed by Executive order, the Clerk of the Privy Council or the Secretary of the Treasury Board may be consulted in cases of doubt as to the practice intended — a department has no discretion.

**335.** A ruling of the law officers many years ago is to the effect that, whenever a per diem rate has been fixed, the accounting must be on that basis regardless of whether costs incurred were over or under the rate. The reasoning was that it is a scheme of averaging costs after the Executive has taken into calculation the total of persons who might be subject to the direction and then fixed what was regarded as being an over-all economical average.

**336. Expenses of a Civil Servant on Leave.**—The Civil Service Act (section 46) provides that a deputy head "may grant" leave of absence for the purposes of vacation. Leave may not be regarded as an absolute 'right' enjoyed by public employees because subsection (2) reads:

> Every officer, clerk or employee shall take the leave granted under subsection (1) at such time during each year as the deputy head determines.

A person going on vacation leave is not eligible to have his travel expenses paid except when permitted by regulation, for example, by the Northern Regulations; but the question sometimes arises: Is he, when called back to duty? In some countries the rule is strict, for example:

> An officer takes his leave of absence at his own risk; it is not granted for the benefit of the Government; if the Government wants his services before his leave expires it must have them, and the officer who takes the risk of that must bear the loss of his personal travelling expenses. (*Fitzpatrick v. U.S.*)

No invariable rule has been adopted in the Canadian public service, but there is audit interest when a reimbursement of travel expenses bears close relationship to the expiry of the leave period. Moreover, it is to be expected that, in such event, the deputy head personally approved reimbursement.

**337. Travel Advances and Travel Expenses.**—Regulations permit advances to persons about to travel on official business. The amount is a matter of departmental discretion, but there is an audit obligation to take notice of any advance that appears to be unreasonably large or where an accounting was not promptly made after the trip. The reason is that either could be, in fact, a loan to a civil servant out of public moneys.

**338.** Similarly, an auditor should note where one department makes a travel advance to a person on the establishment of another because, unless the person is officially seconded for duty, the employing department should finance the outlay until reimbursed by the other. Where a trip relates to more than one service and these have separate votes, it is regarded as permissive either to charge the cost to the vote for general administration of the department, or to allocate it to the votes for the services which necessitated the expense. It is more important to disclose the total expense of a service than the amount paid to a civil servant, therefore audit opinion, when invited, is that it is preferable to charge a service vote.

**339.** Section 36 of the FA Act provides that all outstanding travel advances be repaid or accounted for at the year-end, and a failure so to do vests in the Comptroller power to recover out of any moneys payable to the person to whom the advance was made. A year-end accounting need not be accompanied by a surrender of a balance should the holder still be in travel status on 1 April; provided a suitable certificate is given regarding the unexpended balance, it may be converted into a new year advance.

**340. Reimbursing Expenses of Private Individuals.**—In the audit it is accepted that a Minister over a department may authorize reimbursement of expenses of persons who are not public employees, provided the expenditure was incurred for a public purpose and consequent to an official demand. Of course, this may not be done over a prolonged period because payments would then assume some of the characteristics of salary.

**341.** To provide a reference for cases relating to payments of court costs, an unusual case is now noted. After trial of a prosecution under the Fisheries Act, the magistrate dismissed the case and awarded the accused an amount in respect of his travel expenses and also for loss of time; in other words, wages. The law officers were consulted and advised that the case *The Queen v. Laird* had established that to compensate for loss of time was something beyond the power of magistrates, etc.

## Part IX—Expenditures of Parliament

**342.** Votes for the administrative costs of the Senate, House of Commons and the Parliamentary Library are technically grants to the Crown, but it is not to be assumed in the audit that either the Government or any Minister is answerable for the expenditures. It is a fact that section 17 of the House of Commons Act,

c. 143, R.S., provides that the Speaker's "estimate of the sums requisite" is to be referred to the Minister of Finance "for his approval" but whatever the statutory responsibility of the Minister may be, it ceases with the grant of Supply. In the case of the House of Commons, it is the Commissioners of Internal Economy who are answerable for the application given to the votes, and, while Ministers are generally the named commissioners, they are selected as Members of Parliament who are also Privy Councillors.

**343. The Senate.**—There is scant legislation with respect to financial matters of the Senate. The explanation probably is that, at Confederation, the aim was to model the Upper Chamber along the lines of the House of Lords and it was only in 1870 that the Lords adopted the practice of having that House's estimates included in the Supply Bill. This prompted Mr. Gladstone to make the following observation to the House of Commons:

> Under the old usage, the Lords were accustomed to regulate their own expenditure; but that House, in a spirit that did them credit, had abandoned that privilege, and had consented that the expenditure should come under an annual vote. Under these circumstances it would not be becoming for the Treasury to assume that sort of control over that estimate that they very properly exercised over ordinary estimates.

**344.** In Britain, the Lord Chancellor is, *ex officio*, Speaker of the House of Lords, and May's *Parliamentary Practice* notes that he need not be a peer in order to sit on the woolsack and preside over the deliberations of the House because:

> The woolsack is considered to be outside the limits of the House and the Lord Chancellor, or any other person not being a Peer who is appointed by the Crown to act as Speaker, may preside over the House and may put the question, but he may not vote or take any part in the debates of the House. (16th edition, p. 243)

In Canada, the Speaker must be a Senator although he is appointed by the Crown, because section 34 of the B.N.A. Act so provides:

> **34.** The Governor General may from time to time, by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

However, his powers are those entrusted to him by the Senate and not by legislation.

**345.** In the audit it is regarded that the Clerk is the officer answerable for the initial application of votes, because Rule 103 of the Senate reads:

> **103.** At the beginning of every session, the Clerk is to lay before the Senate, on the day following the appointment of the Committee on Internal Economy and Contingent Accounts, and as often thereafter as he may be required to do so, a detailed statement of his receipts and disbursements, since the last audit, with vouchers in support thereof.

**346. House of Commons.**—The House has long agreed that its expenditures be subject to the same controls as are applicable to departments generally, provided that is done in a manner that does not result in the Crown tampering with the rights, privileges and the independence of Parliament. Section 17 of the House of Commons Act, c. 143, R.S., requires the Clerk and the Sergeant-at-Arms, respectively, to prepare estimates "of the sums which will probably be required". These are submitted to the Speaker for his approval "and are subject to such approval and to such alterations as the Speaker considers proper". In turn, the

Speaker transmits the estimates to the Minister of Finance "for his approval", whereupon they are laid before the House of Commons with the other estimates for the year.

**347.** Unlike the case in the Senate, the Speaker is elected by the House of Commons and has financial responsibilities before and after the grant of Supply, because sections 16 and 18 of the House of Commons Act provide that:

**16.** (1) The Governor in Council shall appoint four members of the Queen's Privy Council for Canada who are also members of the House of Commons, who, with the Speaker of the House of Commons, shall be commissioners for the purposes of this section and sections 17 and 18.

(2) The names and offices of such commissioners shall be communicated by message from the Governor in Council to the House of Commons, in the first week of each session of Parliament.

(3) Three of the commissioners, whereof the Speaker of the House of Commons shall be one, may carry the said provisions into execution.

(4) In the event of the death, disability, or absence from Canada of the Speaker during any dissolution or prorogation of Parliament, any three of the commissioners may carry the said provisions into execution.

**18.** All sums of money voted by Parliament upon such estimates or payable to members of the House of Commons under the Senate and House of Commons Act, are subject to the order of the commissioners, or any three of them, of whom the Speaker shall be one.

By way of explanation of the origin of the requirement in section 16 that the commissioners be members of the Privy Council: At the time of Confederation sessions were relatively short and transportation facilities restricted, therefore it was felt desirable that the members of the Board of Internal Economy should live close to Ottawa. A risk was that this might place the Members of Parliament in the Ottawa area in a preferred position; moreover, they had a special interest in appointments. The solution was to select Ministers of departments who represented different parts of Canada but necessarily spent most of their time in Ottawa.

**348. Library of Parliament.**—The statutory responsibility for the administration of the Library is set out in the Library of Parliament Act, c. 166, R.S.:

**3.** The direction and control of the Library of Parliament, and of the officers and servants connected therewith, is vested in the Speaker of the Senate and the Speaker of the House of Commons for the time being, assisted, during each session, by a joint committee to be appointed by the two Houses.

**4.** The Speakers of the two Houses of Parliament, assisted by the joint committee, may, from time to time, make such orders and regulations for the government of the Library, and for the proper expenditure of moneys voted by Parliament for the purchase of books, maps or other articles to be deposited therein, as to them seem meet, subject to the approval of the two Houses of Parliament.

**349. Financial Practices.**—The FA Act is applicable to expenditures of the Houses of Parliament and the Library, and the Comptroller of the Treasury is required to satisfy himself that proposed charges are lawful and will not over-spend the vote to be charged. However, when he entertains a doubt

as to the legality or otherwise of a proposed charge to an appropriation provided for the expenses of the Senate, the House of Commons or the Library of Parliament, he shall forthwith, through the Minister [of Finance], draw the matter to the attention of the

appropriate Minister who shall obtain a decision in accordance with such procedure as may from time to time be prescribed by the Senate or the House of Commons as the case may be or, in the case of the Library of Parliament, by the Senate and the House of Commons, and the Comptroller shall act in accordance with the decision. (Section 31)

For the purposes of the foregoing, "appropriate Minister" is defined by the FA Act to mean the Speakers respectively and jointly in the case of the Library.

**350.** Because of the constitutional status of Legislation votes, any decision given to the Comptroller is also accepted in the audit because only in extraordinary circumstances would it be regarded that section 70 of the FA Act requires audit notice of a payment already passed upon by a committee of the Senate or Commons, as the case may be. To illustrate, Beauchesne's *Parliamentary Rules and Forms* includes the following observation:

It seems that suspension from the service of the House extends to the Committees of the Whole, Supply and Ways and Means, as well as Standing and special committees. As Committees are the continuation of the House, it is logical that suspension should debar a member from attending a committee whose work forms part of the service of the House. It is safe to say that, for the purpose of indemnity, days of suspension are days of absence, and deduction ought to be made accordingly from the allowance. (p. 42)

Were the Comptroller to act in accordance with the last sentence, no audit exception would be taken. But were the Member to object and the Internal Economy Commissioners, or the equivalent, give a different decision, that also would be accepted in the audit. The above quotation was written before it was enacted that the Comptroller, whenever in doubt as to the legality of a proposed payment, is to secure a "decision" and then "act in accordance with the decision". Moreover, a judicial decision of the House of Lords declares:

The payment is made to and received by every member *virtute officii*. It does not vary with his pecuniary needs or with the expenses he must incur in fulfilling his duties or with the assiduity with which those duties are fulfilled. Indeed, it continues to be payable to him for periods during which he may be disqualified from sitting and voting, and can have no duties to perform. (*Hollinshead v. Hazleton*)

In other words, where legislation affecting Parliament permits of more than one construction and the authority to decide is lodged in a parliamentary body, the Auditor General, being an officer of the House of Commons, calls attention to such a decision only in extraordinary circumstances.

**351. Appropriation Act Legislation.**—At the present time there are two enactments relating to payments to parliamentarians to be found only in schedules to Appropriation Acts. For the convenience of auditors, they are now quoted.

**352.** *Motor Car Allowance to Ministers, etc.*—Appropriation Act No. 5, 1931, which received assent on 3 August 1931, includes:

> 352. To provide for payment annually from the Consolidated Revenue Fund of the sum of $2,000 to each Minister of the Crown charged with the administration of a department, the Solicitor General, and the Leader of the Opposition, and the sum of $1,000 each to the Speaker of the Senate and the Speaker of the House of Commons, in lieu of motor cars and their maintenance, including chauffeurs, the acceptance of such sums not to vacate their respective seats in Parliament . . .

**353.** *Expense Allowance.*—Section 44 of the Senate and House of Commons Act, c. 249, R.S., provides for payment of an allowance to Senators and Members of Parliament "for expenses incidental to the discharge of their duties as a member". The amount is $2,000,

and the section provides that "this allowance shall be paid at the end of each calendar year". This proviso was amended by Votes 195 and 199 of Appropriation Act No. 5, 1955, which received assent on 28 July 1955. At the same time, action was taken to put on a continuing basis a long existing practice of taking notice of deaths and special absences of Senators and Members during a session. The votes read:

> 195. To provide, notwithstanding anything in the Senate and House of Commons Act, the Financial Administration Act or any other Act, for payment of indemnity during the present and subsequent fiscal years, in such amount as the Treasury Board may direct, to or in respect of a Member of the Senate for each day on which that Member did not attend a sitting of the Senate because of public or official business, illness or death, and in the case of death during or subsequent to the Second Session of the Twenty-Second Parliament whether or not the Senate is sitting at the date of death, to authorize the payment of the indemnity aforesaid together with immediate payment of the portion of the allowance for expenses mentioned in subsection (4) of section 44 of the Senate and House of Commons Act...
>
> 199. To provide, notwithstanding anything in the Senate and House of Commons Act, the Financial Administration Act or any other Act, for payment of indemnity during the present and subsequent fiscal years, on the recommendation of the Board of Internal Economy and in such amount as the Treasury Board may direct, to or in respect of a Member of the House of Commons for each day on which that Member did not attend a sitting of the House of Commons because of public or official business, illness or death, and in the case of death during or subsequent to the Second Session of the Twenty-Second Parliament whether or not the House of Commons is sitting at the date of death, to authorize the payment of the indemnity aforesaid together with immediate payment of the portion of the allowance for expenses mentioned in subsection (4) of section 44 of the Senate and House of Commons Act, and any such payment made except a payment of the portion of the allowance for expenses, shall be deemed, subject to section 6 of the Members of Parliament Retiring Allowances Act, to be part of the sessional indemnity of the appropriate Member for the Session in respect of which it is paid...

**354. Special Travel Expenses.**—A member of either House may perform services for the Crown so long as no "salary, fee, wage, allowance, emolument or profit of any kind" is associated therewith. Consequently, there is no bar to a Senator or Member of the House being recouped travel expenses incurred in performing services for the Crown. This is regarded as permitting parliamentarians to serve on royal commissions, represent Canada at sessions of international organizations, etc., and to be recouped expenses. However, it has been regarded by the law officers that, constitutionally, it would be objectionable were payments of expenses made to them when serving on a royal commission if Parliament be actively in session. The reasoning is: Parliament has first claim on the Member's time and it is the duty of a Member to attend, otherwise the exacting of deductions for absences would become meaningless. Of course, if Parliament or either House gives its consent, no audit objection to payment can arise.

**355. Parliamentary Restaurant Accounts.**—The Restaurant is a joint activity of the Senate and House of Commons. While it is assisted out of votes, the Account is not regarded as one within the ambit of the Public Accounts of Canada. The history of the audit arrangement is a somewhat interesting one: Up to 1932 it was not regarded as an account in which the Auditor General had any interest. However, in that year the Auditor General decided that the provisions of the newly enacted Consolidated Revenue and Audit Act, 1931, imposed an obligation on him to examine the accounts of the Restaurant. Accordingly, he wrote the



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Speaker of the House of Commons asking for a statement of receipts and disbursements. On 12 May 1933 the request was considered by the Joint Parliamentary Committee on the Restaurant and it was decided:

> That the Auditor General's application to audit the Committee's books cannot be entertained because such of the Committee's expenditures as are charged against monies received in payment of meals and not against public monies are now audited by the firm of Milne, Steele and Company, who give entire satisfaction.

The Auditor General referred the matter to Treasury Board and in August 1933 it was indicated to the Speaker of the House of Commons that the Board's view was that an annual examination should be made by the Auditor General. No records being made available to him for audit, on 22 November 1934 the Minister of Finance wrote the Speaker urging that this be done. The letter was considered by the Joint Committee but no action taken and the position remained unchanged until 15 May 1936 when a meeting of the Joint Parliamentary Committee on the Restaurant dealt with the matter in the following way:

> The Chairman pointed out that at a recent meeting of the Commissioners of Internal Economy the desirability of its being in a position to carry out close supervision of all House of Commons expenditures was discussed. Arising from this was a request from the Commissioners that regular reports on the Restaurant appropriation vote be submitted for their consideration from time to time. After some discussion, upon motion of Mr. MacInnis seconded by Mr. Landeryou it was unanimously resolved:
>
> (*a*) That, inasmuch as the sum of $15,000 is included in the House of Commons Estimates for the expenses of the Parliamentary Restaurant which receives in addition a substantial revenue from the operation of its business, the Commissioners of Internal Economy would find it easier to control the spending of the House's Estimates if they were supplied with monthly statements showing the receipts and expenditures of the Restaurant;
>
> (*b*) That the Restaurant's accounts should be audited by one of the Auditor General's sub-auditors because, although its revenues are not credited to the Consolidated Revenue Fund, the employees' salaries and the deficit on the yearly operations are charged upon the above $15,000 Vote which is under the control of the Commissioners of Internal Economy;
>
> (*c*) That the Joint Committee on the Restaurant agrees to co-operate in this effort to ensure a close audit of all the moneys voted for the expenditures of the House of Commons.

## The Audit of Contracts for Works, Supplies and Services

**356.** An obligation under section 70 of the FA Act is to draw to the notice of the House of Commons any case observed in the audit where a vote was applied "to a purpose or in a manner not authorized by Parliament". This necessitates a review of contracts and related administrative practices to establish regularity of charges, and in this chapter the Office viewpoint is given with respect to a variety of matters that may arise in the course of examinations.

**357.** At the outset a special problem is noted: the duty to comment on the amount of an expenditure. It is a troublesome matter because, as Mitchell appropriately points out: "Audit staff is not in as good a position as the departments themselves to judge what is economical or uneconomical" (*see* paragraph 328). That is why it is generally accepted that the audit duty to comment really arises only when there has been gross disregard of the public interest. A reckless expenditure is an *ultra vires* payment, therefore one "not authorized by Parliament". It is a truism that where any public authority:

has specific power to incur expenditure but owing to indiscretion in carrying out that power incurs expenditure which is in excess of what is reasonable, such excess may be *ultra vires* and therefore contrary to law... At the same time, this principle will always require to be interpreted in accordance with the actual facts of the case; what may be considered to be *ultra vires* as excessive in one case might not be so considered in different circumstances. (*Macmillan's Local Government Law and Administration,* vol. 13, pp. 41-2)

**358.** Two illustrations are now given. A controversy arose in New Zealand with respect to the legality of charges to a parliamentary vote for brass name plates affixed to a wall of a university library after a war memorial window had been installed by public subscription. The matter went to the courts where it was decided that the university board had acted within its powers but, by way of contrast, it was observed that if the board members had used the vote to pay for

tablets of gold on which were inscribed their own good deeds, it would doubtless be held that they had not exercised their discretion honestly and any disbursement of college funds for such a purpose would properly be declared to be of so excessive a character as to go beyond the limits of legality and become an illegal or *ultra vires* payment. (*Victoria University v. Atty. General*)

**359.** The second illustration pivots on the rule that, as a Minister is always answerable for charges to a vote, he may repudiate an undertaking by any of his officers if, in his opinion, the payment would be grossly excessive in relation to value received. The other party may, of course, sue and, perhaps, succeed, but audit concern is only with respect to the departmental action. If supplies are involved and they still exist, the contractor may be notified to take them away and that ends audit interest. If they have been used or if a works project is involved, the department may tender what is considered to be a fair price or



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it may offer to have a court fix the amount. This once happened in connection with a works project at Moncton. The main contract was made in proper manner but the chief engineer later instructed the contractor to perform other work on a cost-plus 15% basis. The work was performed and the contractor's account was for $106,000. Liability was denied on the ground that the engineer had acted without authority and also because the amount claimed was excessive; however, the Crown accepted the work subject to settlement of its value by the courts. The case went to the Supreme Court of Canada where it was decided that the work had been performed in an extravagant and unreasonable manner and that the value must be determined, not by the contractor's costs, but by "the value of the work to the Crown". $53,205 was allowed. (*R. v. Wallberg*)

## Part I—Capacity to Contract

**360.** The constitutional rule of collective responsibility makes the Cabinet responsible for all contracts of the Crown, but in every case some Minister is answerable to Parliament for the making and administration of each contract. In the audit it is assumed that he is the Minister who is responsible for the application given to the vote to which the contract's costs are charged. It may be that the Minister acted throughout on the specific instructions of the Governor in Council or Treasury Board, but the circumstances would be indeed extraordinary before it could be regarded that such an Executive direction required participation by the Clerk of the Privy Council or Secretary of Treasury Board, as the case might be, either in the signing of the agreement or in its implementation. The Executive may collectively instruct but it is some Minister who contracts and administers and it is to his department that an auditor turns when he requires information.

**361. The Making of a Contract Agreement.**—A Minister need not personally participate in coming to agreement with a contractor, nor need a binding contract invariably be in writing, although a quick reading of some statutes may cause an auditor so to think. For example, section 18 of the Public Works Act, c. 228, R.S., reads:

> **18.** No deed, contract, document or writing in respect of any matter under the control or direction of the Minister shall be binding on Her Majesty or be deemed to be the act of the Minister, unless the same is signed by him or by the Deputy Minister, and countersigned by the Secretary of the Department, or the person authorized to act for him.

Many years ago the Supreme Court of Canada had to consider this text in a case involving a works project at Montreal. In appropriate form, the Department of Railways and Canals (now Transport) had contracted for lumber and it was supplied. Officers on the job later verbally instructed the supplier to make further deliveries, which he did, but a dispute caused the department to contest liability. It did not succeed, the Court deciding that (*a*) the text above quoted did not imperatively require every contract of the department to be in writing, (*b*) the section was applicable only to those in writing, and (*c*) the Crown was liable for supplies ordered and accepted by departmental officers acting in performance of their official duties. (*The Queen v. Henderson*)

**362.** *Capacity of Officers to Place Orders.*—From the foregoing it does not necessarily follow that any civil servant may bind the Crown; he must enjoy a status that permits it to be reasonably regarded that he is clothed with the requisite authority. However, should a subordinate exceed his authority, the order may be regularized and become binding on the Crown upon a more senior officer, having requisite authority, giving notice that he concurs in the action of the subordinate. A practical illustration is when a department contracts beyond its authority and a Treasury Board minute later sanctions the arrangement. On the other hand, if the Minister over the department is of opinion that an irregularly arranged contract was not only imprudent but also grossly extravagant, he may decline to recognize it as a vote liability and that ends audit concern. The contractor may litigate but the outcome is rarely of audit interest, at least so far as the report to the House of Commons is of concern.

**363. Commitment Control Directions.**—Section 30 of the FA Act applies to every department and division of government financed by means of parliamentary appropriations, and requires all contracts to be certified as to availability of funds by the Comptroller of the Treasury. It reads:

> **30.** (1) No contract providing for the payment of any money by Her Majesty shall be entered into or have any force or effect unless the Comptroller certifies that there is a sufficient unencumbered balance available out of an appropriation or out of an item included in estimates before the House of Commons to discharge any commitments under such contract that would, under the provisions thereof, come in course of payment during the fiscal year in which the contract was entered into.
>
> (2) Every contract involving the payment of money by Her Majesty shall be submitted to the Comptroller as soon as it is made or entered into, unless the Comptroller certifies that he does not require it.
>
> (3) The Comptroller shall establish and maintain a record of all commitments chargeable to each appropriation.
>
> (4) Where the Comptroller is satisfied that an agreement was entered into in order to defray an immediate expenditure that, through accident to public property or other emergency, was necessary to protect such property or to provide for such emergency, he may issue his certificate accordingly and thereupon the agreement is exempt from the operation of subsection (1) from the time the agreement was entered into.

**364.** *The History of the Section.*—In August 1930 there was a change of Government and on taking office the new Minister of Finance (he was also Prime Minister) requested a report on the current state of each vote and on commitments outstanding. It took several weeks to prepare these because departments then operated by use of letters of credit and only a few maintained records of commitments. When the papers did reach the Minister's desk they disclosed, among other things, that: (*a*) some votes were practically exhausted, (*b*) one vote was so over-committed, and had been for years, that practice was to select accounts for payment by reference to the number of months or years they had been due and payable, (*c*) various departments were dilatory in settling with the Department of Public Printing and Stationery, and (*d*) although the departments had taken weeks (ten in one instance) to prepare a list of outstanding commitments, many statements were footnoted to the effect that they might be incomplete. To say that all of this irritated the Minister would be to understate. The imme-

diate result was a decision to centralize control of commitment accounting and cheque issues. Thus the Office of the Comptroller of the Treasury came into being and a new Consolidated Revenue and Audit Act was enacted, the original text of the section now under review being drafted by the Minister personally.

**365.** *Comparison of the 1931 and 1951 Sections.*—When section 30 of the FA Act is compared with section 29 of the Consolidated Revenue and Audit Act 1931, it will be observed that the earlier text opened with the words "no contract, agreement, or undertaking of any kind", while the present section simply says "no contract". Whether that narrows the ambit is a matter that need not be explored because there has been no significant change in Treasury practice of recording encumbrances nor has there been a change in that part of the text which reads:

> No contract . . . shall be entered into or have any force or effect unless the Comptroller certifies that there is a sufficient unencumbered balance available . . .

But when the Minister drafted he visualized that effect would be given by the Comptroller stamping his certificate on each contract agreement. In application that proved to be impracticable—sometimes no Treasury office was conveniently available and in other instances the time consumed in securing a certificate impeded administration. The alternative adopted was that departments, when entering into major commitments, would state in submissions to the Governor in Council that the Comptroller was prepared to certify as to availability of funds. Subsection (2) was added in 1951:

> (2) Every contract involving the payment of money by Her Majesty shall be submitted to the Comptroller as soon as it is made or entered into, unless the Comptroller certifies that he does not require it.

A purpose is to make certain that, regardless of the year in which a liability may fall due, the contract is recorded with the Comptroller. But it also modifies subsection (1), at least so far as the department is concerned. Whether it lends protection to the contractor is a question of law outside audit interest. Another gap in the 1931 legislation was that commitment control could not be exercised whenever departments were operating with interim supply. That was remedied by adding the words "or out of an item included in estimates before the House of Commons".

**366.** *Application of Section 30.*—From the foregoing it will be observed that the purpose, or at least one purpose, of the section is to establish a financial check on the contracting process of departments, with the Comptroller, an administrative officer, the policeman. However, the Act does not require outstanding commitments at the year-end to be summarized and reported to Parliament. For these reasons, it is regarded that the duty on the Auditor General is to observe whether any department acts in a way that blunts the legislative purpose of the section: the orderly budgeting of vote resources to the end that the provision made by Parliament takes care of all normal needs of a year.

**367.** *Future Years' Commitments.*—Of course, section 30 is applicable only to contracts requiring a payment to be made within the fiscal year—the Comptroller cannot anticipate what may be granted in the future. The extent of a

Minister's power to contract for future payment is really a question of law so need not concern an auditor whose interest starts with a payment. The general safeguard against forward committing is section 38 of the FA Act:

> **38.** It is a term of every contract providing for the payment of any money by Her Majesty that payment thereunder is subject to there being an appropriation for the particular service for the fiscal year in which any commitment thereunder would come in course of payment.

The contractor takes the financial risk with the obligation on the department to notify the Comptroller as soon as agreements are signed and also to arrange for an allotment in a vote at the commencement of the year in which a liability will mature and come for payment.

**368.** *Votes Authorizing Forward Contracting.*—Where a vote authorizes future commitments up to $x$ dollars, various considerations may have influenced the Crown's decision to use such a text. For example, it may be that: (*a*) contractors want prior legislative notice of the contracts before they sign, or (*b*) advance notice to Parliament provides justification for future Estimates items, or (*c*) it is fit and proper that Parliament have notice of the financial implications associated with implementation of current policies, or (*d*) it places on the Comptroller an obligation not only to record the contracts but also to reject any in excess of the named amount in the vote. In practice, the certificate he gives reads:

> Certified that this requisition has been recorded and if and when Parliament grants an appropriation in the ensuing fiscal year for the service indicated, it will be entered as an encumbrance against such appropriation.

**369.** None of the conjectured reasons listed in the paragraph above imperatively requires legislation; the Audit Office view is that, by accepting the vote, the Crown has undertaken that contracts for future years' deliveries will collectively not exceed the amount stated in the vote. So regarded, the audit obligation is to establish that all contracts made by reason of such texts are for purposes within the ambit of the vote and that the total of commitment certificates is within the amount stated.

**370.** Occasionally it may happen that a liability under such a contract does mature within the current year. In that event no audit exception is taken to payment, provided that neither the vote is over-expended nor regularly recorded and matured liabilities are left unpaid.

**371. Legality of Payments.**—The FA Act requires that the Auditor General call the attention of the House of Commons to any case where he is of opinion that an expenditure was not authorized by Parliament. Earlier in this chapter reference was made to *ultra vires* payments due to reckless extravagance; what is now referred to are cases where a payment is made in excess of the contractual obligation. There is a duty to report these, although the legal right to recover may be a question of law. By way of illustration, in *The King v. Toronto Terminal Railway Co.* the point in issue was the contention of the Crown that the Department of Public Works had reimbursed more on municipal tax account than an agreement (authorized by order in council) committed the Department to pay.

The suit was to recover the excess and the Crown was successful. The Court, after observing that Parliament appropriated funds for lawful payments only (liabilities legally incurred and for purposes appropriately authorized), held that the Department having exceeded its authority, illegal payments had been made and were recoverable.

**372.** An auditor therefore considers not only whether a charge qualified within the ambit of the vote charged but also whether it was within the obligations assumed under an agreement. In addition, he considers whether any piece of legislation imposes a limitation on a department's capacity to contract and pay, or to make an *ex gratia* award. This is why reference is now made to the texts of section 13 of the Public Works Act, section 10 of the Department of Transport Act and section 32 of the FA Act.

**373.** *Section 13 of the Public Works Act.*—The text now quoted is also section 10 of the Department of Transport Act. It reads:

> **13.** Nothing in this Act authorizes the Minister to cause expenditure not previously sanctioned by Parliament, except for such repairs and alterations as the necessities of the public service demand.

The wording is somewhat archaic, the reason being that the section antedates Confederation and was enacted in an effort to outlaw a practice of officialdom ordering work to be performed (often without consulting the Minister) and then pointing to the need for a vote to permit the contractor to be paid.

**374.** In the 1870s the Supreme Court of Canada relied on the section to reject a claim for payment for work performed on Parliament Hill. However, the language of the judgment (*Wood v. The Queen*) lends support to the view that the judges were far from being unaware of the irregularities and public controversies associated with the construction of the Parliament Buildings (*see* Hodgetts' *Pioneer Public Service,* pp. 198-204), and it may be that they felt the public interest demanded that they hew to the line. Moreover, parliamentary practice then was to be specific in listing works projects to be charges to votes.

**375.** In any event, legal thought has since become more liberal in construing such enactments, particularly when a government, rather than a municipal body, is involved. Cognizance is taken of the improbability of any outsider knowing what is the current financial state of a vote. For example, a United States federal statute stipulates that, subject to certain exceptions:

> no contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment.

Judicial practice in that country is to regard the last few words as not applicable to contracts where the charge would be to a general appropriation but the courts appear to be strict when the contract is for a purpose that, by congressional practice, would normally be provided for by a specific vote. Similarly, Mitchell, in reviewing limitations imposed on British Government departments and other public authorities, advances the view that such legislation is really

> directed to internal control of the administration, and not to the relationships between the administration and individuals. (*The Contracts of Public Authorities,* p. 235)

His reasoning is that, were it otherwise, it could be grossly unfair to the other party who will rarely know the appropriate vote heading under which his contract falls, let alone the current state of the appropriation or administrative transfers between subheads, any virement between votes, etc.

**376.** For reasons such as the foregoing and because of current appropriating practices in Canada, the Audit Office regards section 13 of the Public Works Act and section 10 of the Department of Transport Act as necessitating audit observations only when breach is indisputable. A case noted in the 1955-56 Audit Report illustrates: A major project had been duly authorized and an amount provided in a vote for the current year's anticipated needs. Work proceeding more rapidly than had been expected, the Department notified the contractor several months before the year ended that: (*a*) the appropriation for the contract was exhausted, (*b*) if the contractor was prepared to continue, the Department would recoup bank interest charges, and (*c*) a further vote would be obtained as soon as practicable. The contractor continued construction, borrowing for the purpose. In these circumstances the contractor had official notice that no funds were available for further work. Since there was no vote credit available to which the interest costs might be charged, the undertaking to pay interest was regarded as contrary to law.

**377.** *Section 32 of the FA Act.*—Unlike the section just noted, section 32 of the FA Act applies to all departments of government. It reads:

> **32.** No payment shall be made for the performance of work or the supply of goods, whether under contract or not, in connection with any part of the public service, unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister or other officer authorized by such Minister certifies
>
> (*a*) that the work has been performed or the material supplied or both, as the case may be, and that the price charged is according to contract, or if not specified by contract, is reasonable, or
>
> (*b*) where a payment is to be made before completion of the work or delivery of the goods, that the payment is in accordance with the contract.

The requirement in the 1878 Consolidated Revenue and Audit Act was that no cheque issue "except upon the certificate of the Auditor General" and that, when payments for works or materials were involved, no payment "shall be authorized by the Auditor General" unless suitably vouched as to performance, etc. Consequently, the Act required that he report to Parliament only when charges to a vote were not supported "by proof of payment". The Auditor General no longer having any prepayment duties, the direction in section 70 of the FA Act now is to call attention to any charge "not properly vouched or certified". Section 32 may be regarded in the audit as directory and permitting Treasury Board to instruct the Comptroller when a voucher has been lost or a certificate is incomplete, etc. The Office accepts the view of Durell:

> The justification for including in the accounts an item supported by an incomplete voucher must necessarily be a matter of opinion to be decided on the merits of each case as it arises. A voucher may be complete in all material points and yet require amendments in detail. To withdraw it from the account of the year in which payment has been made, though possibly the technically correct method, would be contrary to the spirit of the system. (*Parliamentary Grants,* p. 406)

**378.** It is a condition of most works contracts that progress and final payments be made only when claims are supported by an engineer's certificate. However, the purpose is that stated in a decision of the Supreme Court long before the present FA Act:

> The only office of the certificate under the contract is that it is a voucher to the department charged with the disbursement of public moneys that the claim is due, and at the same time the existence of such a certificate is a condition precedent to enable the contractor to obtain any money at all. That is its only purpose. (*Goodwin v. The Queen*)

A contractor is entitled to expect that a department certify in accordance with the provisions of the contract. A municipal case will be used to illustrate the consequences when an engineer deviates from the terms of contract in giving a performance certificate. The City of Oshawa awarded a paving contract which stipulated that the chief engineer certify by weight the amount of gravel used. Instead, he measured the area and computed what amount of gravel in his opinion had been required and certified accordingly. In litigation the City pointed to a clause in the contract to the effect that in the event of any dispute the decision of the chief engineer "shall be final". This argument was not accepted, the Supreme Court of Canada holding that:

> when the engineer refused to certify for the gravel by weight as called for by the contract, but adopted a method of his own, he abdicated his proper function under the contract. His refusal to certify in accordance with the contract was completely arbitrary and illegal. (*Oshawa v. Brennan Paving Co.*)

As a result, it was held that the engineer's action absolved the contractor from the requirement of a final certificate before becoming entitled to payment.

**379.** A further independent certificate is sometimes needed. For example, when a ship is contracted for, a condition of the contract is that the vessel will be accepted only when certified under the Shipping Act. In such circumstances, a contract may not be regarded as performed before the necessary certificates are given.

**380. Contract Rules and Regulations.**—The application given to rules and regulations referable to the contracting process is of audit interest, but it does not follow that the Auditor General reports to the House every irregularity observed in application. The appropriate action may be to draw the matter to the notice of the department and, in certain circumstances, to the Minister of Finance. Section 39 of the FA Act reads:

> **39.** The Governor in Council may make regulations with respect to the conditions under which contracts may be entered into and, notwithstanding any other Act,
>
> (*a*) may direct that no contract by the terms of which payments are required in excess of such amount or amounts as the Governor in Council may prescribe shall be entered into or have any force or effect unless entry into the contract has been approved by the Governor in Council or the Treasury Board, and
>
> (*b*) may make regulations with respect to the security to be given to and in the name of Her Majesty to secure the due performance of contracts.

It will be observed that, while the opening words vest in the Governor in Council a general power to declare "the conditions under which contracts may be entered into", any regulation resulting may only supplement—it cannot override—specific

directions in other statutes, but those made for the purposes of (*a*) and (*b*) take the place of other legislation to the extent that the text directs. Consequently, regulations made for the purposes of the first part of the section are regarded in the audit as binding only when not inconsistent with other legislation.

## Part II—The Negotiating Process

**381. Tenders for Work Projects.**—Unless exempted from its provisions by law (the Department of Defence Production is an example), section 36 of the Public Works Act is applicable to all departments of government. The section reads:

> **36.** Where a work is to be executed under the direction of a department of the Government, the Minister having charge of that department shall invite tenders by public advertisement for the execution of the work except in cases where
>
> (*a*) the work is one of pressing emergency in which the delay would be injurious to the public interest,
>
> (*b*) the work can be more expeditiously and economically executed by the employees of the department concerned, or
>
> (*c*) the estimated cost of the work is less than $15,000, and it appears to the Minister, in view of the nature of the work, that it is not advisable to invite tenders.

The text, other than (*c*), dates from Confederation. In 1880 an order in council exempted works costing under $5,000 from the advertising requirement and it was applied until 1902. In that year the Auditor General challenged the legality of the order in council and was supported by the law officers. Therefore, in 1903 the present subparagraph (*c*) was added, save that "$15,000" then read $5,000.

**382.** *Definition of "Work".*—The word "work" in the section means a physical work involving the construction, alteration or repairing for some purpose of public convenience. It does not extend, for example, to finished articles such as materials and equipment required in construction jobs.

**383.** *The Words "Public Advertisement".*—What constitutes public advertisement is determined by surrounding circumstances. Years ago it was regarded that posters in public places of the locality met requirements when a local job of modest size was involved, but when the project was one where big contractors could be expected to compete, a bridge for example, bids were invited by letters or circulars to all equipped to provide what was needed. Currently, regulations made under the authority of section 39 of the FA Act include this definition:

> "public advertisement" means advertising in the public press.

**384.** In the audit there is less interest in the form advertising takes than in the response. United States legislation respecting contracting is often more detailed than is the practice in Canada, a consequence being more litigation and judicial interpretations. A quotation from one judgment is:

> The purpose of these statutes and regulations is to give all persons equal right to compete for government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts; ... and thus to secure for the Government the benefits which arise from competition. (*U.S. v. Brookridge Farm*)

Broadly stated, the Audit Office view of directions to advertise a works project is: Reasonable notice should be given, the test of reasonableness being the response to the invitation for tenders, i.e., an advertisement in newspapers does not automatically justify acceptance of a tender if no genuine competition for the work results. Conversely, audit notice need not be taken of an award without newspaper advertising when the Minister concerned decides that, in special circumstances, a competitive price would more likely be achieved by using other means. An illustration could be a contract award to be performed outside of Canada where government practice is to invite selected firms to submit offers. Again audit evaluation will be founded on results.

**385.** *Pressing Emergency Awards.*—The Auditor General has a special obligation to the House of Commons whenever a contract is awarded without advertising when

> the work is one of pressing emergency in which the delay would be injurious to the public interest.

In such cases he has to satisfy himself that the discretion was exercised in appropriate circumstances. Some Minister is answerable to the House of Commons for deciding not to invite bids and, as Robson puts it, in exercising a statutory discretion a Minister

> must honestly endeavour to further the purposes for which power has been given him, and must not seek to promote ends of his own, however benevolent or deserving of praise they may be. (*Justice and Administrative Law*, 2nd ed., p. 299)

**386.** To illustrate by use of an old case, in 1902 the Auditor General doubted the regularity of a decision where a department, by relying on this subparagraph, placed a contract without advertising because $15,000 would otherwise lapse in a vote—that reason was specifically recited in an order in council. No Public Accounts Committee report resulted but a year later the Auditor General received unexpected support when, in answering a question in the House of Commons as to what was a pressing emergency, the Minister of Public Works explained that it referred "particularly to cases of injury by flood or fire or unforeseen circumstances", using a canal lock accident to illustrate. A like view is taken in the United States. A federal statute requires that tenders be always invited except when "the public exigencies" do not permit. A definition of the Comptroller General of the United States is generally accepted:

> a 'public exigency' must be a sudden and unexpected happening, a perplexing emergency or complication of circumstances; or a sudden or unexpected occasion for action. (Decisions, 1935)

Street (an English writer) after a review of U.S. court decisions, adds that "the emergency must not be merely the creation of the government agency". (*Governmental Liability*, p. 96)

**387.** The Audit Office treats as debatable the regularity of a contract award made without advertising whenever it is self-evident that the contracting department has been dilatory in advance planning and then was in a hurry to award a contract. Nor does it appear reasonable to assume that a statutory "pressing

emergency" exists because a contractor will move off a site if further work is not offered. It seems more reasonable to regard section 36 of the Public Works Act as providing for quick contract awards where resulting expenditures will be statutory exceptions from commitment requirements. That is to say:

an immediate expenditure that, through accident to public property or other emergency, was necessary to protect such property or to provide for such emergency. (Section 30 (4) of FA Act)

**388.** *Day Labour Projects.*—No advertising is necessary when a work is to be performed by employees of a department; but a department may first invite tenders and later decide to use day labour. In deciding, a Minister has, subject to Cabinet policy, an unfettered discretion; an auditor need not consider the merits of alternatives. There is, of course, an audit obligation to establish that persons employed were engaged and paid in conformity with the Civil Service Act or whatever statute may be applicable. No employment arrangement would be regular if the department has not the exclusive right to hire and fire.

**389.** The 1880 order in council referred to in paragraph 381 above was applied to limit day labour jobs to those costing under $5,000 and this practice of regarding 'small jobs' only as within the meaning of the section continued after the 1903 legislation. In 1939, however, a department applied for an allotment for a day labour project estimated to cost $60,000—a big work at costs then prevailing. The Comptroller of the Treasury provisionally set up an allotment subject to a ruling being given by the law officers. They confirmed his view that the "or" between subparagraph (*b*) and (*c*) in section 36 of the Public Works Act made them independent of each other.

**390.** At one time it was the Audit Office view that, once a Minister exercised his discretion, no portion of the work could be done by contract. Notice is now taken of the fact that it is the rule rather than the exception for general contractors to sub-contract for reasons of economy and efficiency. There seems no reason why the department may not do the same, provided the contract is awarded after advertisement, if it involves more than $15,000.

**391.** *The $15,000 Limit.*—Finally, there is subparagraph (*c*) of section 36. Hansard of 1903 contains an observation of continuing audit interest. The amount was then $5,000 and an Opposition Member asked the Minister of Public Works whether the text would not permit a $20,000 job, for example, to be done by pieces over a period of four years and thus avoid inviting tenders. The Minister replied:

Speaking for myself, I should say that for a Minister to proceed with a work as the hon. gentleman has put it, would be a straight violation of the spirit of the Act... If he undertook a work that would cost a large sum of money and let it in small pieces year after year, I would look upon that as a subterfuge.

**392. Tenders for Supplies.**—Supplies requirements of the Department of Defence Production and of the Department of Public Printing and Stationery are regulated by statute. An extra-statutory practice is that while the Department of Fisheries Act, c. 69, R.S., requires tenders for its supplies to be invited by

public advertisement (except in cases of pressing emergency), practice is to regard that Department as subject to regulations applicable to departments generally. These are made under the authority of section 39 of the FA Act and require public invitation by advertising in newspapers except when (*a*) the need is one of pressing emergency, (*b*) there is only one available source of supply, or (*c*) the estimated cost is less than $15,000.

**393.** *One Available Source of Supply.*—(*a*) and (*c*) above have already been reviewed in connection with tenders for works, so reference is now to the "only one available source of supply" exception. On occasion, an auditor observes that a departmental officer has decided that only the product of a particular supplier would satisfy the departmental need. That may, in fact, be the case, but the purpose of tenders is to establish a competitive price and to safeguard against discriminatory practices within the Public Service. Where more than one product will do, but the considered opinion of the department is that one will serve the purpose better than another, the appropriate action is to apply for an Executive exception from the regulations. Of course, there is no audit problem whenever the concurrence of Treasury Board is automatically necessary by reason of the amount involved because it is assumed that the Board simultaneously took notice and made an exception from the regulations; however, it is the Office view that it is in the interests of good administration that the memorandum to Treasury Board note where no general invitation for tenders had been made.

**394. Tender Practices.**—The audit concern is in the efficiency and fairness of practices. A department is expected to act without bias. For example, test borings are sometimes made in advance to assist the department in designing the project. It is not imperative that the results of such tests be made known to prospective bidders but, if shown or made available to one, there is an irregularity if not made available to all. However, any defect in the making of tests or inaccuracy in reports thereon does not provide a claim for relief to a bidder—he is expected to protect himself. Of course, in suitable circumstances it is within the discretion of the Governor in Council to take notice of the plight of a contractor and to extend relief by an *ex gratia* payment when wholly unexpected conditions are encountered. An example might be excavating after demolishing structures on a site and the resulting discovery of unanticipated soil conditions, or the renovating of a building which had structural defects unforeseen at the time of signing the contract.

**395.** *Sealed Tenders.*—Legislation does not specifically require but it is generally agreed that it is sound administrative practice to require tenders to be delivered in 'sealed form', the reason being:

> to prevent leakage (or what is nearly as damaging—suspicion of leakage) of information. (*Macmillan's Local Government Law and Administration,* vol. 12, p. 423)

Where a bidder subsequently telegraphs a change in a sealed bid, it is regarded as permissive to take notice of the telegram because it is the bidder who invites the possibility of his offer becoming known to competitors through his use of a means of communication that involves various persons participating in transmittal.

**396.** *Errors in Tenders.*—In the audit it is regarded that a bidder may withdraw a tender up to the opening of the envelopes; if he is allowed to do so afterwards, the audit interest is in the departmental reasons. After bids are listed, it is within departmental discretion to allow a bidder to correct errors in his offer, so long as the effect does not vary in any way the quality, etc., of the article to be supplied or the service to be rendered.

**397.** A department is expected to test the accuracy of computations, classifications, etc., and if any error is such that the presumption must be that a mistake has been made, an auditor will expect that the department draws it to the notice of the bidder; otherwise it might later be contended that there had been no true meeting of minds and that the contracting department knew of the mistake and sought to take advantage of it. Moreover, as King points out:

> It is neither clever nor farsighted to take advantage of a mistake . . . the long view is more important than the single temporary advantage. (*Public Supplies,* p. 134)

**398.** *Identical Tenders.*—Sometimes identical prices are quoted. In that event a department may decide which offer it will accept, although in the United States the award is often made by drawing lots. The difference in practice is due to the fact that a Canadian Minister is in Parliament and is answerable for every decision his department makes, while a different constitutional relationship exists in the United States between Legislatures and the Executive. Sometimes a department may decide to split the contract between the bidders but their concurrence is necessary because the bid being for the total quantity, the department is rejecting the tenders and negotiating on a new basis.

**399.** *Discounts Associated With Tender Prices.*—Departmental practices vary in computing bid prices when an offer of a cash discount is associated therewith. In principle, the price quoted is the prime price because the discount is in the nature of a reward when the department qualifies for it. The audit concern is whether a department invariably takes advantage of discounts when it comes time to pay. In this regard, where an auditor is doubtful as to the pertinent time date, Audit Office practice is to assume that time runs from the date of the invoice on which payment is made or delivery accepted, whichever is later.

**400.** *Tenders for Part Only.*—A bid for part of the advertised requirements should not be taken into consideration while offers for the total requirement are being compared. However, no audit exception is taken to such an offer being considered once it is decided that the order should be allotted to more than one contractor in order to secure quick delivery or for other good reason. The Office view is that a decision of a department to proceed in this manner means that all tenders have been rejected and contracts are being negotiated by using tender offers as a pricing yardstick.

**401.** *Late Tenders.*—It is unfair to other bidders when a department takes notice of a tender received after the stipulated day and hour. The Audit Office's interest stems from the fact that any practice of recognizing late bids has associated

therewith the risk of collusion, fraud or the passing on of information with respect to other tenders. It is for such reasons that, when consulted, an auditor suggests the return of any tender received after the deadline, preferably unopened.

**402.** *Non-Competitive Buying.*—There are instances where orders are placed without price being the influencing consideration. An order given to an organization for the handicapped is an example. Public policy being involved, an order of this type, regardless of amount, should be noted in the audit if not authorized by an Executive order.

**403.** In a somewhat different category are contracts awarded to a particular area because of reasons other than price. An illustration would be a case where the contractor is manufacturing in an area where there is an abnormal ratio of unemployment. Where a consideration of this nature influences a contract award, audit interest is in whether an Executive order sanctioned the making of the contract.

**404.** Another type of case, generally involving supplies or services, is where a particular firm has a long record of satisfactory service and is familiar with the needs, ways and methods of a department. What is the audit view when a new bidder is a little lower? An English writer, treating with practices of British public authorities, has expressed the view:

> The difference may be slight, but difference it is. But the original firm feels it has a grievance. Unconsciously it has acquired a vested interest in the authority's business. It claims (often with good reason) that it has always given a little extra by way of service than was called for in the contract. The human side is real and clear. However, competitive tendering is competitive tendering . . . There is also a further consideration. Is it good sense and good business to be tied to a single source of supply? . . . There is also the very real consideration that the 'service' of the new firm is an untried quantity and should it fail, a good deal of criticism will fall on the Supplies Department. It is doubtful if any better advice can be given than to deal with each of these cases strictly on its merits without fear or favour and having made a decision to stick to it. Often firms displaced in this way will make a resolute effort to regain the business on the next occasion when offers are invited. (King, *Public Supplies,* p. 137)

**405.** *Treatment of Lowest Tender.*—In the audit it is never assumed that a bidder acquires a right to a contract because his offer is the lowest; the public interest ranks first with price only one of the factors to be taken into calculation. Moreover, experience demonstrates that there is substance in the following observation by Graske:

> Where the contract price is too low to promise any profit for the contractor or indicates a certain loss, this seeming advantage is often turned into a disadvantage on account of skimping by the contractor on the work in an effort to prevent a loss or to make a profit. Work taken at a low price must be given rigid inspection and the Government representatives on the work must be constantly vigilant; this often leads to disputes and appeals. The accomplishment of the work is thus often delayed and the indirect costs increased. (*The Law of Government Defense Contracts,* p. 123)

**406.** No audit obligation to take notice automatically arises when the lowest offer is rejected, although the auditor should consider the reasons for its being passed by. Where the amount involved is less than $15,000, or the work is classified as being of "pressing emergency", the decision (excepting in quite small

cases) should be ministerial because it is the Minister who is ultimately answerable to the House of Commons. So far as construction projects are of concern and the amount involved is in excess of $15,000, regulations made under the authority of section 39 of the FA Act require that the consent of Treasury Board be obtained to pass by the lowest tender. While the departmental Acts applicable to Public Works, Transport and Fisheries require the consent of the Governor in Council "previously to passing by such lowest tender", Treasury Board now sometimes decides.

**407.** Sometimes an auditor has to consider whether a department has correctly listed a bid as being the lowest. An example might be tenders for supplies with quotations f.o.b. plant. May a department take notice of delivery costs between shipping point and destination for use? The Office view is that, in suitable circumstances, this provides good reason for passing by other tenders. To illustrate, it will be assumed that equipment is required in western Canada and that eastern and western suppliers bid, with the offer of the latter higher in price, but when delivery charges to point of use are added, over-all cost will be less. In such circumstances, no exception should be taken when the department accepts the offer that is less costly to the public.

**408.** *Rejection of All Tenders.*—There is no audit interest in a decision to reject all tenders because no expenditure results. However, it is sometimes observed that, after tenders are rejected, the department negotiates a contract, generally with the low bidder. In that event, there is a duty to review departmental action. The aim of public advertising is to establish a competitive price. When only one genuine offer is received, there has not been competition; consequently, a duty on the department is to establish whether the price quoted is, in fact, a fair one, and it is not inappropriate should it review the specifications to ascertain whether modifications, etc., will result in a new proposal from the bidder and which, at the same time, may be beneficial to the public in the financial sense. Where action taken appears reasonable, no audit notice is necessary should a contract be negotiated without further invitation for tenders.

**409.** The position is somewhat different when tenders are rejected because of changes in requirements after public advertising for tenders. For example, the size of the project may have been increased or reduced by reason of changed needs. In these circumstances the department often negotiates with the firm that submitted the low bid. In view of the fact that it is generally accepted that during the performance of a contract there will be additions and extras ordered by the department, audit notice is taken only when the character of the project has so changed that it may not be regarded that tenders originally received continue to provide a competitive price yardstick.

**410.** *Reports to Treasury Board.*—The Auditor General has no immediate interest in the recommendations of departments to Treasury Board with respect to proposed contract awards; audit interest starts with the text of the resulting minute which, however, is to be read together with the department's submission to the Board.

**411. Contract Awards.**—The audit duty to Parliament is to make certain that contracts have been regularly authorized in accordance with the provisions of any statute applicable thereto. That an authorizing Executive order be of record before a contract is signed may be a matter of importance to a contractor, but long-established Office practice is to respect a retrospective Executive concurrence so long as no payment had been made.

**412.** *When a Parliamentarian Has an Interest.*—Rarely, but sometimes, an auditor observes that a Senator or Member of the House of Commons appears to have a monetary interest in a contract. Section 19 of the Senate and House of Commons Act, c. 249, R.S., provides that in every contract

> there shall be inserted an express condition, that no member of the House of Commons shall be admitted to any share or part of such contract, agreement or commission, or to any benefit to arise therefrom.

If a contractor offends, he is liable to a penalty of $2,000 which is recoverable, after legal proceedings, "by any person who sues for the same". In turn, the Member is liable to similar legal proceedings at a rate of $200 for each and every day on which he continues to sit or vote. A general exception is when the financial interest of the Member is that of a shareholder save where the contractor is a company "for the building of any public work". Section 21 of the same Act treats with the case of a Senator. These enactments are to safeguard the independence of Parliament. They do not make the contract illegal—it is the parliamentarian, not the Crown, who is the offender and recourse against him is through the courts. For that reason audit interest is indirect.

**413.** *When a Public Employee Has an Interest.*—It sometimes happens that a civil servant has a direct or indirect interest in a contract awarded by a department of which he is an employee. This is more likely to occur during a national emergency when business executives and professional men are temporarily associated with public departments. There is no law prohibiting but, as the United Kingdom Public Accounts Committee pointed out during War II, such a direct interest can "become an occasion for scandal". The Committee recognized that it was a question of degree and that sometimes it was unavoidable—an illustration being a piece of property owned by a civil servant but needed for a public purpose. The Committee recommended recourse to regulations rather than to legislation.

**414.** In the absence of regulations, etc., the Audit Office view is that, whenever a public employee (in the broad sense of the term) has an interest in an award to a company in which he has a significant interest, it should be a matter of record that he disclosed his interest to either the Minister or deputy head of the department and, unless instructed otherwise, refrained from participating either in negotiations or contract administration.

**415.** Where a civil servant is the vendor or the purchaser in a contract with the Crown, it is customary that Treasury Board concurrence be obtained, especially when the civil servant is employed in the department directly involved. Should the contract be for special services, the Office view is that, as a civil servant is

expected to devote his working hours to performance of public duties, whatever form they may take, the Civil Service Act stands in the way of a contract for services being made.

**416. Awards of Cost Plus Contracts.**—Currently there is no legislation regulating awards of cost plus contracts. The authority so to contract stems from the consideration that in special circumstances the Government must take whatever action it considers to be in the public interest. The award is a decision of policy founded on (*a*) a public need and (*b*) the contractor's repute and ability to perform the services required. He does not automatically become an agent of the Crown but the essence of the agreement is that the Crown assumes liability for all costs necessarily incurred within the scope of the agreement and, in turn, the contractor agrees that his fee or profit shall be no greater than that stipulated by the agreement.

**417.** Because the decision is one of policy, an Executive order should be of record indicating that the decision is founded on necessity or financial prudence—audit notice would have to be taken were it apparent that the real purpose was to circumvent a requirement to advertise for bids. Graske in *The Law of Government Defense Contracts* gives examples of circumstances where the cost plus form is justified by reasons of necessity and/or financial prudence:

(*a*) where the project is of such importance that accomplishment with the utmost speed and certainty takes priority over cost;

(*b*) where the location is isolated and the engineering data available are meagre; or

(*c*) where early completion of the project necessitates a start before all plans and specifications are prepared.

**418.** The decision being one of policy, the concern of the Auditor General is really in the efficiency of the Treasury cost audits. Parliamentarians view with reservations the efficacy and economy of this type of contract, therefore it is expected that auditors take notice of any case where the need for employing this form of contract may have been artificially created by dilatoriness, etc., within a department.

**419.** Because of its nature, it is a condition of every cost plus contract that it is subject to cost audit. The law does not imperatively demand that cost audits be by the Comptroller of the Treasury, but section 31 of the FA Act makes him responsible for the application given to all cost audit findings. The text reads:

> **31.** (7) Where, in respect of any contract under which a cost audit is required to be made, the Comptroller reports that any costs or charges claimed by the contractor should not in the opinion of the Comptroller be allowed, such costs or charges shall not be allowed to the contractor unless the Treasury Board otherwise directs.

A cost audit is undertaken during or after the completion of a contract, consequently moneys may have been paid to the contractor by way of progress payments, etc. Should the Comptroller, as a result of a cost audit, disallow certain items of cost, the obligation is on the contracting department to recover, otherwise there is an irregular charge. A Treasury Board overruling relieves the Comptroller of responsibility for the payment, but an overruling is not to be regarded

in the audit as an adjudication—if there is audit doubt as to the regularity or propriety of departmental action or the payment, notice is still to be drawn to it.

**420. Letters of Intent and Go-ahead Letters.**—During War II these were frequently used in cases of urgency or where it was necessary that a manufacturer get his plant tooled for the performance of a contract; currently they are issued only in extraordinary circumstances. A letter of intent is a notice that a department intends to place a contract with the firm. It does not authorize incurring of expenses other than those necessary as a preliminary to starting work as soon as a contract is awarded. A go-ahead letter authorizes a contractor to proceed with production pending settlement of the terms and signing of a contract. Audit interest normally starts with resulting payments. Both types of letters commit a Minister to the extent of the text, but the regularity or legality of his undertaking is dependent on the statutory powers he enjoys. If he lacks clear authority so to contract, any resulting payment is a matter to be noted in the Report to the House of Commons.

## Part III—Special Legislation

**421. Defence Services Contracts.**—Sections 9 and 15 of the Defence Production Act, c. 62, R.S., vest in the Minister of Defence Production the "exclusive authority" to contract for defence projects and supplies requisitioned by the Department of National Defence. The statute traces from the Defence Purchases, Profits Control, and Financing Act, 1939:

> An Act to establish a Defence Purchasing Board to control the awarding of contracts for the manufacture of defence equipment and the construction of defence projects, to limit costs and control profits in respect of such contracts, and to authorize the raising by way of loans of certain sums of money for such purposes.

That statute imposed limitations on powers exercisable by the Minister of National Defence, consequently auditors will assume in any case of doubt that it is the Minister of Defence Production who enjoys the authority to contract. Conversely, it is not to be regarded that the Minister of Defence Production alone may contract for National Defence when the contracting process is regulated by some other statute, but it will be borne in mind that section 38 of the Defence Production Act reads:

> **38.** The powers conferred by this Act may be exercised notwithstanding anything contained in the Public Works Act or in the Public Printing and Stationery Act.

**422.** When the Minister of Defence Production acquires materials or substances for stockpiling purposes (section 14 of the Act) he may do so without a requisition of the Department of National Defence.

**423.** *Delegations by Minister.*—The Minister of Defence Production may, with the approval of the Governor in Council, delegate to other Ministers the power to contract for "such" supplies or defence projects as he may designate. He has empowered the Minister of National Defence to effect local procurements within certain limits. Whenever there is a delegation of power, an auditor will

bear in mind that the provisions of the Defence Production Act continue to be applicable. A general exception (section 9 (2) of the Act) is a defence project constructed "by persons in the employ of Her Majesty". This generally means one performed by Service personnel or employees of the Department of National Defence with performance regulated by the National Defence Act, c. 184, R.S., and regulations made thereunder.

**424.** The aim of the Defence Production Act being to concentrate procurement responsibility in one Minister, any unofficial usurpation of the field by officers of other departments would result in illegal charges to votes. Whether the Minister of Defence Production may regularize by post-acceptance of the transaction is a question of law. However, no audit exception would necessarily be taken were the Governor in Council to decide to make a *quantum meruit* settlement in exchange for a complete discharge from any legal liability.

**425.** *National Defence Requisitions.*—The Minister of National Defence is answerable to Parliament for the regularity of charges to votes for the administration of the Department of National Defence and the Service Forces. The only modification, when compared with duties and responsibilities of other Ministers, is that most, but not all, contracting is a responsibility of the Minister of Defence Production, who is therefore answerable for the terms and conditions of contracts and the execution thereof. In other words, the Minister of National Defence stipulates the nature and quantities desired and the Minister of Defence Production then procures the supplies, etc. The ambit of the Defence Production Act does not otherwise disturb the powers of the Minister of National Defence under any other Act.

**426.** Audit problems may arise in cases where the Minister of National Defence requisitions the Minister of Defence Production to arrange for "the performance of professional or commercial services" (section 15), because section 9 of the National Defence Act provides that:

> **9.** Such officers, clerks and employees as are necessary for carrying on the business of the Department may be appointed in the manner authorized by law.

which means: in accordance with the Civil Service Act. In considering section 15 of the Defence Production Act, no particular notice need be taken of the word "professional"; the key word is "services". In any given case, whether a person is carrying on a profession is a question of degree and always of fact; as one eminent judge once remarked: "I should certainly not assent to the proposition that as a matter of law every accountant carries on a profession or that every accountant does not". To illustrate the general position a British case will be used because the services involved were of a type that arise in audits now being considered. The point before the court was whether certain profits were professional earnings—if they were, an excess profits tax did not apply. The appellant was an incorporated company consisting of three naval architects and the business of the company was that of 'naval architects and consulting engineers'. Practice

was that the company selected and sent naval architects to perform services for its customers. The court decided that the company must pay tax:

> It is of the essence of a profession within the meaning of the exception [of the taxing Act] that the profits should be dependent on the personal qualifications of the person or persons who carries it on . . . The business of a naval architect is a "profession" within the meaning of the exception; but the business of a company who sends out naval architects to do the work is not a profession. (*Esplin (William), Son and Swainston Ltd. v. Inland Revenue Commissioners*)

Ordinarily, the audit problem may be simplified by going directly to the root: Is the service involved one within the scope of the Civil Service Act? If it is, section 15 of the Defence Production Act may not be regarded as providing a means to the Minister of National Defence to bypass the Civil Service Act. In passing, the provisions of the Defence Production Act do not prohibit, in appropriate circumstances, the Department of National Defence from contracting directly for professional or commercial services.

**427.** *Defence Production Department Contracts.*—In addition to performing services for the Department of National Defence, the Minister of Defence Production may, as a charge to appropriations to his Department or by use of the statutory Defence Production Revolving Fund, do many things (*see* sections 14 and 15) without a request from another department. Because of the nature of the listed activities, the Minister's powers are broad although that statute tends to be more specific than is the general rule. For this reason it should not be regarded in the audit that the text of a vote for Defence Production adds to the powers, or areas of interest, of the Minister unless that intent is clearly indicated. In other words, a general vote for purposes of the Department is to be regarded in the audit as regulated by the provisions of the Department of Defence Production Act.

**428.** *Award of Contracts.*—Whether the contract be to fill a requisition of the Department of National Defence or for a purpose of the Department of Defence Production, section 17 contemplates that the Governor in Council concur before the Minister contracts, but the section makes exceptions if:

(i) in the opinion of the Minister, the contract must be entered into immediately in the interests of defence,

(ii) the estimated expenditure, loan or guarantee does not exceed $25,000, or

(iii) competitive tenders have been obtained and the lowest tender, involving an estimated expenditure not exceeding $50,000, is accepted.

The text applies alike in times of peace and war, therefore the Audit Office regards the words "in the interests of defence" in (i) as relating to an urgent or unexpected need arising in the application of defence policy. However, auditors will give the expression a more restrictive meaning than the phrase "pressing emergency" in section 36 of the Public Works Act. For the purposes of the latter, a calling for bids by public advertisement will normally consume a period of days and sometimes weeks. The Minister of Defence Production is under no like statutory compulsion. He may, but need not, invite tenders, nor need he use newspaper advertisements to secure offers. Therefore, the Office view is that subparagraph (i) provides for a need that is so urgent that the Minister must act before the

Governor in Council is next assembled. His decision is final in such a situation. No audit observation need be made in those circumstances, but one would have to be considered were subparagraph (i) relied on for awards of boot contracts, for example, because a Service Force's requisition was to augment warehoused inventories.

**429.** The purposes of (ii) and (iii) are more directly related to administration: the Minister may contract, with or without inviting tenders, up to $25,000, but he may not do so for an amount between $25,000 and $50,000 without the approval of the Governor in Council unless competitive tenders were first obtained and the award is to the lowest bidder. Thus audit interest is in "competitive tenders" and "lowest tender..... is accepted". It is taken for granted that the Department endeavours to get the best price practicable although there is audit interest in practices employed to achieve that end. However, what is now of concern is the regularity of contracts entered into under the authority of subparagraph (iii). The aim of the section may not be regarded in the audit as achieved if the competition is that offered by a 'straw man'. There must be genuine competition for the contract. On the other hand, "lowest" may be regarded in the audit as the offer received from the lowest bidder regarded by the Department as competent and capable of performing the contract within the time period applicable to the public need.

**430.** A direction at the end of section 17 requires the Minister to report to the Governor in Council contracts in excess of $10,000. This is not of audit interest because it does not affect in any way the legality of a contract or resulting payments.

**431.** *Re-assessment of Costs and Profits.*—Section 21 of the Defence Production Act empowers the Minister to order a price adjustment whenever he "is satisfied" that the amount paid or payable in respect of a defence contract entered into after 1 April 1951

is in excess of the fair and reasonable cost of performing the contract together with a fair and reasonable profit.

The discretion is ministerial, therefore the audit obligation, so far as section 21 is of concern, is to draw to the Department's notice any case observed in the audit where it appears ministerial consideration may be desirable.

**432. Printing and Stationery Contracts.**—A more general procurement monopoly is administered by the Queen's Printer. Section 4 of the Public Printing and Stationery Act, c. 226, R.S., declares that the Department of Public Printing and Stationery shall be "charged exclusively" with the duty of providing the Houses of Parliament and all departments of government with their requirements for:

(*a*) printing, stereotyping, electrotyping, lithography, binding work, or work of the like nature, and the procuring of the material therefor,

(*b*) paper, books and other articles of stationery of whatsoever kind, except books that are required for the Library of Parliament, and printed books required for the use of the chaplains, libraries or schools in the penitentiaries.

As a matter of reference record, an order in council of 30 March 1955, made under the authority of the Public Service Rearrangement and Transfer of Duties Act, c. 227, R.S., permits all departments to purchase books directly, save "books published by departments and agencies of the Government". There are, of course, a number of statutory exceptions including (*a*) the National Library Act, c. 330, R.S., which permits direct purchases of books for the National Library, and (*b*) section 38 of the Defence Production Act, c. 62, R.S., which permits the Minister of Defence Production to contract directly. Another exception takes its origin in long-established practice due to the nature of the printing involved: the Minister of Finance negotiates term-of-years contracts for production, as required, of engraved bond certificates, postage and excise stamps, etc., with the departments concerned placing orders for their requirements. In cases of doubt, the obligation is on a department to establish its authority to purchase directly.

**433.** A Crown corporation listed in either Schedule C or D of the FA Act may order printing from the Queen's Printer although not a "department" within the meaning of the Public Printing and Stationery Act. As the corporation is wholly owned by the Crown, any amount owing to the Queen's Printer may be recognized for purposes of the Queen's Printer's Advance Account.

**434.** *Office Machines and Equipment.*—These are not "articles of stationery" but established practice is that the Department of Public Printing and Stationery provides the requirements of departments. Currently that status is confirmed by a Treasury Board Minute of 14 January 1955. Punched card tabulating machines and electronic calculating and computing devices are excluded, but the following articles are subject to the Minute:

typewriters, adding machines, calculators, dictating and recording equipment, microfilming equipment, bookkeeping machines, filing equipment other than standard letter and legal size filing cabinets; duplicating and bindery equipment including photocopying, ozalid and blueprinting machines, folding machines, collators, etc., mailroom equipment, addressing machines, time clocks, time stamps, cash registers and all office machines or equipment of a like nature.

**435.** *Tenders.*—Section 25 of the Public Printing and Stationery Act requires that purchases involving $1,000 or more be made only "after tenders have been called for". However, when there are not competitive sources of supply, practices are regulated by the Government Contracts Regulations made under the authority of section 39 of the FA Act, with the approval of Treasury Board necessary whenever a contract of any kind exceeds amounts stated in the regulations.

**436.** *Charges to Departments.*—Because the departments do not enjoy a discretion in placing printing orders, etc., the working of the Public Printing and Stationery Act revolves around the principle that billings be founded on cost incurred. Printing Bureau costs of operation are first charged to the revolving fund known as the Queen's Printer's Advance Account established to enable him:

to purchase material for the execution of orders given or requisitions made under the provisions of this Act, and to pay the wages of workmen engaged in the execution of such orders or requisitions.

But the sum that may be advanced by the Minister of Finance is limited to $4,000,000, plus amounts due by the Houses of Parliament and departments.

There is nothing in the Act prohibiting the Queen's Printer from adding a percentage surcharge for undistributed overhead costs; however, a department may question a billing with Treasury Board having the final word. Of course, no charge to the Advance Account may be a final expenditure charge; any operating cost not recovered must ultimately be charged to a vote. Should a profit accrue from operations it is to be accounted as Revenue.

**437. Senate and House of Commons Contracts.**—Awards of contracts relating to the internal economy of each Chamber are wholly within the control of some parliamentary committee. In the case of the Senate it is generally the Committee of Internal Economy and Contingent Accounts and the statutory (c. 143, R.S.) Commissioners of Internal Economy for the House of Commons.

**438.** What is within the ambit of 'internal economy' is a matter for each Chamber to decide unless there is specific legislation (the Civil Service Act for instance) on the subject. To illustrate, prior to 1878 it was the practice of the Department of Finance to pay over to the accountants of each Chamber amounts appropriated for their expenses, whereupon the Accountant deposited in a bank account and looked to a committee for expenditure instructions. In 1879, within a year after the Consolidated Revenue and Audit Act was enacted, letters of credit were substituted and the newly appointed Auditor General undertook an audit of the accounts. He was denied access because the Act treated only with the accounts of "departments of government" which, as the Law Clerk of the House correctly pointed out, neither Chamber was, thus the subject of audit was one of internal economy. The Auditor General countered with the observation that:

> The only examination given to the expenditure is by the Internal Economy Commission in the Commons, and by the Contingent Committee of the Senate, which bodies may be assumed to take the place of the Public Accounts Committee with reference to other expenditure, that is to review general principles, but not to take up details.

The Public Accounts Committee in 1880 considered the matter and recommended that the Auditor General be suitably instructed. Bourinot records that:

> The House subsequently agreed to have all their accounts fully audited—the printing and library accounts being included in the resolutions on the subject. (*Parliamentary Procedure*, 2nd ed., p. 232)

The Senate took similar action. While, therefore, it is necessary in the audit to consider whether an expenditure is within the ambit of a vote, the contracting process is wholly controlled by a parliamentary committee, because regulations made under section 39 of the FA Act are not binding.

**439.** The Minister of Public Works has the administration of the Parliament Buildings as a "public building" within the meaning of the Public Works Act. Normally, furnishings, etc., are provided by the Department, but should officers of either House, on their own responsibility or in carrying out directions of a committee, place orders for services or supplies, the Department of Public Works does not automatically become liable for the cost. Again using an old dispute to illustrate the distribution of responsibilities between the Executive and the House of Parliament: In the 1870s there was no Printing Bureau, the practice



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being to make five year contracts with a printing firm on unit price bases. In 1874 bids were invited simultaneously for future needs of (*a*) the Joint Committee on Printing and (*b*) departments of government. As a result, separate contracts were entered into with the same firm. One was signed by the Clerk of the Joint Committee on Printing, the other by a Minister. Later the contractor complained that neither Parliament nor the departments were sending all jobs to his plant and, that practice continuing, he sued the Crown for damages. He succeeded so far as the departmental printing contract was involved, but failed with respect to the other, the Chief Justice of the Supreme Court holding that:

> The Parliamentary printing was a matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control. The Crown could neither dictate to the Joint Committee of both Houses, nor interfere, nor deal with any contract entered into by them or by their Clerk under their authority . . . (*The Queen v. MacLean*)

In other words, the contractor had to look to Parliament, not the Crown, for relief.

## Part IV—Contracts Generally

**440. Terms and Conditions in Contracts.**—When a contract results from a public invitation for bids, an auditor examines to establish that the terms of the contract harmonize with the invitation, otherwise advertising was a sham and the contract irregularly arranged.

**441.** *Special Terms and Conditions.*—A problem to an auditor may be that of establishing that contract conditions were within the authorization to contract. The Executive, of course, must act within any statute applicable, so what is now to be reviewed is the application given by a Minister to the Executive authorization which sometimes simply names the purpose, contractor and price.

**442.** A works contract generally includes provisions requiring the contractor to perform extras, to secure consent to sub-contract, etc., and rights exercisable by the Minister often include the power to alter plans and specifications, to suspend or to take over the work, to impose penalties, to fix rates for equipment, to bar claims for unforeseen costs, to direct insuring, etc. These are ordinarily to be found in contracts between individuals, but searches of statutes will rarely disclose enactments specifically empowering a Minister either to insist upon the inclusion of some or to commit the Crown in other instances. Therefore the subject is now reviewed.

**443.** Where sanction of the Governor in Council or Treasury Board was a condition precedent, an auditor will review the text used in calling for tenders to note whether the text of the proposed contract was circulated with the plans and specifications or if notice was given that it was available for inspection. In that event, an observation of the Supreme Court of Canada is to the point:

> The signing of a contract exhibited with the plans and specifications was a condition of the tender and, therefore, all its clauses were duly authorized by the Order in Council . . . and are binding upon the parties, who had a complete knowledge of its contents. (*The King v. Paradis & Farley Inc.*)

**444.** No problem exists in connection with Defence Production Act contracts because section 17 of that Act includes:

> **17.** (3) The Minister may settle or approve the terms and conditions of a contract he is authorized to enter into under this section and may from time to time prescribe general terms and conditions that may be incorporated by reference into particular defence contracts or any class or classes of defence contracts.

This permits the Minister of Defence Production to insert whatever terms and conditions he considers necessary; in addition, he may bind contractors by quasi legislation. Where other Ministers have not comparable statutory power, all special terms and conditions must be incorporated into the contract.

**445.** A Minister functioning under an ordinary departmental Act contracts as the head of a department and, as was once stated in a case involving a Minister of the Quebec Government:

> The head of each department has the management of the affairs pertaining to it, and he can, on his own responsibility, transact all matters of ordinary official routine or of departmental administration and all further acts of administration for which statutory authorization has been given to him. (*R. v. Waterous Engine Works Company*)

The Minister draws his authority from the statute establishing his department and from any other statutes applicable, so unless they impose limitations he is expected to conduct himself in a manner to secure as good a bargain as circumstances permit.

**446.** Where the interest of the public is paramount, the obligation on the contractor is that of strict execution. In such a situation the parties to the contract are not equals—the Minister must ensure that contracts are performed in a manner that promotes and protects the public interest. Consequently, an auditor will assume that contracting Ministers enjoy discretionary powers, with the House of Commons less interested in what may be stipulated in the contract than in its performance—a great Australian judge once said of the role of Parliament where contracts were involved that:

> It authorizes executive action, prescribes its limitations and consequences, or ratifies in a legislative sense, and, in short, makes the law of the contract, but it is not a party to a contract itself. (Isaacs J. in *Commonwealth of Australia v. Colonial Ammunition Co.*)

**447.** *Penalties.*—Contracts generally provide for penalties in the event of default by a contractor. These are not in the nature of security given for due performance and frequently the purpose is solely to create a state of *in terrorem:* to encourage prompt performance of the contract. Broadly regarded, when no loss results the Minister enjoys a discretion in deciding whether or not to invoke a penalty provision. The audit duty is to make certain that the decision to waive was made in appropriate manner and circumstances—a British Public Accounts Committee once observed:

> If penalties are waived as a matter of course there is a risk of contractors assuming that they can always disregard limits of time in their contracts with impunity.

Audit Office practice is to draw to the notice of the House of Commons only those cases where (*a*) a material public loss was suffered and (*b*) either the contract did not provide for exaction of a penalty or it was not enforced. (*See* also paragraph 286)



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**448.** *Extras and Additions.*—There are regulations made under section 39 of the FA Act to control departmental practices with respect to extras and additions, but what is now being considered is the parliamentary interest. Not infrequently it happens that after work commences various changes are made in plans and specifications. These may be of a magnitude that indicates inefficient first planning but, more generally, are due to changes necessitated by problems arising in the course of construction, or a reappraisal of the public needs. Should the change be so substantial as to make the original contract no longer appropriate, an amendment is, in fact, a new contract. In that event, the Auditor General has to consider whether the matter is one that should be drawn to the notice of the House of Commons because tenders were not again invited.

**449.** The fact that the contractor encounters special difficulties is not justification for the introduction of a new rate in a unit price contract. A Supreme Court decision already noted will be used to illustrate. A department advertised and awarded a unit price contract for a wharf. The contractor encountered 'hard pan' of an exceptional type and sought extra compensation. He failed, the Supreme Court of Canada holding that the work performed was fully covered by the contract and that the obligation of the contractor

> was not to drive piles in a *specified soil* but to drive them in a *specified place*. The words in the specifications "where and as shown on the plan" mean clearly that the respondent is obligated to drive these piles in a certain area determined in the plans for the price of $1.95 per sq. ft. (*The King v. Paradis & Farley Inc.*)

**450.** There are also the normal extras and additions resulting from decisions of the department. They are, in effect, separate transactions supplemental to the original contract with payments made on agreed terms. Regulations made under section 39 of the FA Act permit contracting departments some latitude as to amounts, so all that need now be considered is the audit duty to the House of Commons. Durell points out that extras:

> almost inevitably affect the work on the original contract, and it is therefore desirable that they should be restricted, so far as the interests of the public service will permit. If departures are admitted, contract penalties cannot readily be enforced; and the advantages of competitive tender are lost—in the case of services classed as extras—by the general necessity for accepting the contractor's own terms for the uncovenanted work. (*Parliamentary Grants*, p. 338)

Audit Office practice it to consider whether attention should be drawn to extras whenever (*a*) the amount involved is large, (*b*) there was apparent extravagance or (*c*) the situation was inadequately disclosed to the House of Commons when a vote was sought and granted to pay the cost.

**451.** In examining payments for extras, an auditor will observe what safeguards were taken in authorizing them, since they are departures from the original contract, though technically not classed as transactions outside the terms of the contract. If different rates are introduced, a new contract is to be regarded as in effect and the question of power so to contract will be reviewed. Another type of variation to be explored is when an extension of time to complete is granted. Normally the discretion is departmental but Executive concurrence is

to be expected where a contract was awarded, with Executive concurrence, to a particular contractor (price being subordinated) because he was regarded as best able to do the work or make deliveries within a stated time.

**452.** *Wages Liability Clauses.*—Mechanics liens, etc., registered under the authority of provincial statutes are ineffective when a Crown project is involved. However, the Wages Liability Act, c. 287, R.S., provides that:

> **2.** If any contractor with Her Majesty, or any sub-contractor in the construction of any public work let under contract by Her Majesty, makes default in the payment of the wages of any foreman, workman or labourer, employed on such work, or in the payment of any sum due by him for the labour of any such foreman, workman or labourer, or of any team employed on such work, and if a claim therefor is filed in the office of the Minister entering into such contract on behalf of Her Majesty, not later than two months after the same becomes due, and satisfactory proof thereof is furnished, Her Majesty may pay such claim to the extent of the amount of all moneys or securities in the hands of Her Majesty for securing the performance of the contract at the time of the filing of the said claim.

A text similar to this once was reviewed by a Nova Scotia court and it was decided that it did not bring within its ambit the salary paid to the secretary of the contractor nor legal and audit fees incurred in connection with the contract. (*Irvine v. Hervey*)

**453.** The Wages Liability Act serves a dual purpose: (*a*) it affords workmen some protection that they might acquire by registering a mechanics lien were it not a Crown project, (*b*) it permits security deposits, holdbacks and balances due to the contractor to be paid to others without first securing an authorizing appropriation.

**454.** Sometimes a situation presents itself where a contractor simultaneously defaults on more than one contract. An auditor has then to consider whether it is within a Minister's discretion to direct that credits and claims be pooled. Because section 95 of the FA Act allows the Crown to set off its claims against any money payable to the contractor, it will be assumed that Parliament expects that the Crown recoup its loss out of any moneys payable to the contractor before any consideration is given to claims of workmen and suppliers. It is the Office view that, if a credit balance remains, the intent is that it be associated with the contract producing it, leaving to claimants whether to sue the contractor so far as his other assets are of concern. Of course, where there exists a dispute as to entitlement, the department may pay the money into court, thus leaving to the Exchequer Court the decision as to distribution. The Attorney General must first be consulted and the Court agree that a doubt exists as to whom the money should be paid. Then section 24 (3) of the Exchequer Court Act, c. 98, R.S., provides:

> **24.** (3) Upon payment of any such moneys into Court in accordance with any such order, the Crown is *ipso facto* released and discharged from any and every liability whatsoever regarding the moneys so paid into Court, and any person claiming to be entitled to the whole or any share of the moneys so paid in is at liberty to institute an action in the Exchequer Court by way of petition for the recovery of the same; . . .

**455.** Where a department takes over a contract, it sometimes happens that a balance remains in the security deposit or holdback account after work is

completed. As this was declared forfeited by the contract, should the balance be credited to Revenue or may it be paid to the defaulting contractor? This is a question of law but the Office reasoning is that, as the obligation to give security was not inserted to produce Revenue, audit notice need not imperatively be taken of a payment to the contractor.

**456.** *Words and Phrases.*—Unless a statute or the text of a contract indicates that words and phrases are to be given a particular meaning, trade customs may be regarded as applicable. For example, as a rule, the expression *more or less* has for its purpose that of ensuring that neither party will be entitled to relief on account of a deficiency or surplus, except in a case of so great a difference as to raise the presumption of fraud or gross mistake in the essence of the contract. The words *about* or *approximately* should be tested by trade usage. *As is and where is,* when no representation is made as to quality or quantity, is generally governed by the rule of *caveat emptor* (let a purchaser beware). *Such quantity as may be required* generally commits a contractor to the decision of the department provided it acts in good faith.

**457.** The expression *act of God* is often encountered in contracts but it is one that may be given varying interpretations by the courts. Ordinarily, an auditor may rely on a definition used in reviews of United States Government contracts:

> Lightning, earthquakes, great droughts, tornadoes, high winds, extraordinary floods, a storm or tempest of extraordinary violence, waterspouts, violence of the seas, and other like disturbances of the elements are usually regarded as acts of God but this is not true of storms and weather conditions which are not unusual in character and which could have been reasonably anticipated.
>
> Floods and freshets of an unprecedented or extraordinary nature are acts of God in a legal sense, but they are not such where they could have been anticipated by ordinary foresight and prudence.
>
> Constant, unusual, or heavy rains, and an ordinary flood or freshet, cannot of themselves be classed as a providential hindrance.
>
> Freezing and zero weather, at a season of the year when such weather is naturally to be anticipated, cannot be brought within the definition of the term 'act of God'.

**458. Transfers of Contracts and Subcontracting.**—The audit interest being in the regularity of payments, notice is taken in the audit of any transfer or assignment of a contract. It may be that the terms and conditions of the contract regulate such contingencies but, generally speaking, the position is that no contractor is free to transfer at whim his contract to another. Once he enters into a contract with a department the contractor must, at whatever cost to him, ensure regular performance and, if he either will not or cannot do so, the department may select another to perform the contract and this at the risk of him who originally assumed the obligation. In turn, after a Minister secures an Executive authorization to contract, he may not alter the character of the services to be performed nor agree to the contract being transferred to another until he has Executive concurrence to such action.

**459.** Contracts frequently provide that, with the consent of the department, a contractor may subcontract. Normally, this does not establish a right whereby a subcontractor may demand a payment from the department. He is not a party

to the contract between the prime contractor and the department. (*Pearson v. The King*). However, when the prime contract is cost-plus in character, it may be required that the contractor sublet under competitive conditions or that sub-contract awards be at prices satisfactory to the department.

**460. Security Deposits.**—Sometimes it is a condition in the invitation for tenders that bids be accompanied by a deposit as a guarantee that the bidder will sign a contract. There is limited audit interest in this deposit because of the legal adage that 'one person's default should not lead to another's undue enrichment'. In other words, a public loss has first to be established before the Crown can claim the money and that generally will be by litigation. The auditor's interest in these deposits is in whether the department made all bidders comply and that all deposits received were appropriately safekept and administered.

**461.** Quite frequently the deposit accompanying the tender becomes the security for the due performance of the contract. Various statutes call for "good and sufficient security" being given. What those words mean is no longer an audit problem because regulations (with the effect of law) have been made under the authority of section 39 of the FA Act which permits the Governor in Council to give directions

> with respect to the security to be given to and in the name of Her Majesty to secure the due performance of contracts.

In addition, the auditor checks to make certain that no payment was made to the contractor until the requisite security had been given. There is an irregularity to report to the House of Commons if any payment is made before the contract is signed by all the parties therein named and the requisite security given.

**462.** A department is expected to administer every contract in such a way that the security undertaking does not become unenforceable. However, administration is not under audit. The interest of the House of Commons is in any failure to recoup a public loss out of security given for the purpose.

**463.** *Holdbacks.*—Frequently it is provided in contracts that progress payments will be made as work progresses, with a percentage held back until the contract is completed or until the Crown decides its interests are adequately protected. A holdback is additional security for due performance so departments are subject to regulations made under section 39 of the FA Act.

**464.** An auditor has also to observe application given to section 40 of the FA Act:

> **40.** Where a payment under a contract is withheld to ensure the due performance of the contract, the payment may, subject to this Act, be charged to the appropriation for that contract, and the amount so charged may be credited to a special account in the Consolidated Revenue Fund, to be paid out in accordance with the contract under regulations of the Treasury Board.

The audit concern will generally be in the finality of the departmental decision to credit the special account. Audit Office practice is to regard a department as enjoying a power to reverse an entry during the year in which the credit was

established. However, once the state of a special account is reflected in the Public Accounts, any charge to the special account, other than to discharge the Crown's liability for holdback, would be an unauthorized expenditure.

**465.** There is an audit obligation to make certain that no special account balance (either for security deposit or holdback) continues to be so recorded after a contractor defaults. It becomes available to complete the work covered by the contract and title of the account should be varied.

**466. Powers of Attorney.**—Sometimes a contractor gives notice that he has assigned payments under a contract, generally to a bank. An old English decision declares:

> There is no common law prohibition against the Crown recognizing a power of attorney given by a contractor but it lapses with his death. (*Lepard v. Vernon*)

Consequently, various statutes prohibit assignments of pensions, etc., because were they permissive the public aim of providing life income might be defeated. In the case of ordinary contracts, the public interest is in making certain that public payments are applied, to the extent necessary, to the performance of the contract. However, administrative practice is not regulated by statute but by Executive regulations. Among other things, these require that the Department of Justice approve the text of an assignment before the Comptroller of the Treasury acts on it. Also, save with the sanction of an Executive order, no irrevocable assignment may be recognized. A reason for the latter is that any undertaking to make payments as work progresses is really to ensure that the contractor has a continuing flow of funds to facilitate financing of the project to completion. This public purpose could be defeated were moneys diverted to other ends.

**467.** *Payment Notwithstanding Notice to Contractor.*—It may be observed in the course of an audit that, despite the fact that a power of attorney in proper form is of record, payment was made to the contractor. The holder of the power of attorney may have a grievance, but that would be a question of law, not one of audit.

**468.** Another possibility is that, due to a mistake in a Treasury office, a power of attorney is overlooked and payment made to a contractor who retains the money. The Treasury mistake may not be remedied by issue of a cheque to the assignee because the first payment discharged the liability. What is then involved is the debt, if any, of the Crown to the assignee as a result of the mistake. If the Governor in Council is of opinion that a measure of relief should be extended, it will take the form of a payment charged to a vote specially secured for the purpose or by an *ex gratia* payment. (*See* paragraphs 233 to 236)

**469.** *When Contractor Revokes.*—It may also happen that a contractor gives notice that he is revoking the assignment. Again it is a question of law, but as the original document was reviewed by the Department of Justice an auditor will expect that the form of revocation was satisfactory to that Department and that no Treasury action was taken before the law officers considered the matter and

the department directly interested agreed. The reason for this is that it can happen that the legal position between the contractor and the assignee is such that the contractor may be restrained by the courts from accepting the money. That need not bind the Crown, but there is a decision (*Eastern Trust v. MacKenzie & Mann*) where rather strong criticism was addressed by the Judicial Committee of the Privy Council to the Government of Nova Scotia because it made payments to a contractor after it had notice of a restraining court order. Consequently, a mixed question of law and policy may be involved.

**470.** *Lapsing of Powers of Attorney.*—Cases may sometimes arise where it is doubtful if a power of attorney is still in effect. The proper audit action is to suggest that an opinion of the Department of Justice be obtained. Ordinarily the position is as Alcock states:

> Apart from express revocation, a power is determined by certain events, such as death, lunacy, or bankruptcy, by acts of the principal inconsistent with its continuance, by the extinction or exhaustion of the power, or by the expiry of time. This is usually known as the doctrine of implied revocation. (*Powers of Attorney*, p. 166)



52831-5—10

## The Audit Obligation with Respect to Public Property

**471. Introductory Note.**—The first Auditor General was under no statutory obligation to report to the House of Commons on public stores and equipment accounts. However, the 1878 Act did provide that, should the Minister of Finance so require, he examine accounts of "provisions or stores", etc., and report thereon to the Minister of Finance:

> who shall, if he thinks fit, signify his approval of such accounts; and the Auditor General on receipt of such approval shall thereupon transmit to the Accountant a certificate in a form to be from time to time determined by the Auditor General, which shall be to such Accountant a valid and effectual discharge from so much as he may thereby appear to be discharged from.

**472.** The Consolidated Revenue and Audit Act 1931 varied the foregoing by directing that the Auditor General "shall, from time to time, examine" stores and equipment accounts. Although the effect was to place on the Auditor General a duty to examine these accounts, the requirement was in quite general terms; moreover, the Auditor General was to report to Treasury Board by means of a certificate which "shall be a valid and effectual discharge according to its terms". The task performed by the Auditor General continued to be for administrative rather than parliamentary purposes, a consequence being that any dissatisfied department enjoyed a right of appeal to Treasury Board, which:

> after such further investigation as it considers equitable, whether by *viva voce* examination or otherwise, may make such order, directing the relief of the appellant, wholly or in part, from the disallowance or charge in question, as appears to it to be just and reasonable; and the Auditor General shall govern himself accordingly.

**473. The FA Act Direction.**—Section 67 makes the audit a parliamentary one, the direction now being to examine accounts relating to public property generally and to ascertain whether in the opinion of the Auditor General:

> essential records are maintained and the rules and procedures applied are sufficient to safeguard and control public property.

Thus, in giving effect to section 70 of the Act, the obligation is to note any instance where audit opinion is that accounting records are inadequate or weaknesses exist in the administrative process.

**474.** *Disposal of Crown Lands.*—An interest of Parliament is in making certain that Crown property is not sold or given away without its sanction. This constitutional rule is of English origin. William III, like other kings, had made many grants of Crown lands to favourites and when Anne came to the throne it was noted in a preamble to an Act that revenue from Crown lands:

> hath from time to time been impaired and diminished by the grants of former Kings and Queens of this realm so that Her Majesty's land revenues at present can afford very little towards the support of her government.

In short, Parliament was viewing with alarm the growing tax burden and had decided that all Crown property should be brought under its control. The enactment took the form of a sentence of over 400 words—without a single punctuation stop—so the following is a mere extract of the declaration that any royal grant of land

under the great seal of England Exchequer seal seals of the dutchy and county palatine of Lancaster or any of them or by Court roll or otherwise howsoever . . . shall be utterly void and of none effect . . .

**475.** It may seem strange that this British Act of 1702 is part of the law regulating land in Canada but it is. For example, in 1945 the Supreme Court of Canada had to consider the effect of the statute on a transfer of land, by order in council, between the Governments of Canada and British Columbia. No special legislation treated with the land in question so it was argued that the statute of Anne barred the transfer. The Court, however, accepted an earlier statement of the law as applicable:

There is only one Crown, and the lands belonging to the Crown are and remain vested in it, notwithstanding that the administration of them . . . may, from time to time, . . . be regulated upon the advice of different Ministers charged with the appropriate service . . . (*Saskatchewan Natural Resources Reference*)

**476.** *Disposal of Moveable Property.*—Less restraint exists with respect to the disposal of property in the form of stores, equipment, etc. Apart from statutory prohibitions, the principle applicable to disposals of all types of public property is that the Crown may not alienate if that would impair the proper discharge of governmental functions. As this test is present only to a limited degree in sales of stores, etc., the audit interest will generally be in making certain that proceeds of sales are credited to Revenue. However, there is audit concern in establishing the authority to make gifts. In modern parliamentary history the outstanding decisions have been with respect to the disposal of military equipment and stores. For example, in 1921 the British Public Accounts Committee took notice of the fact that the British Navy had given, subsequent to 11 November 1918, various naval vessels, etc., to Commonwealth and other governments and drew attention because:

It is clearly a serious matter that ships of the British Navy should be given away without the consent of Parliament.

The same Committee also took notice of gifts of Army stores valued at about £18 million to Russia and £2 million to Poland and 50 aircraft to Greece, etc. The Committee expressed the view that:

In the case of small items, or where the gifts are merely a transfer to some other Department, it is sufficient that they be authorized by the Treasury and reported with the Appropriation Accounts to Parliament; but where the value exceeds £10,000 we consider that the concurrence of Parliament should be first obtained. (1921 Report)

**477.** In the following year the Public Accounts Committee considered the question again and instructed the Treasury to review the constitutional position and report, because:

On inquiry we find that the greatest constitutional authorities have laid it down that gifts of national property cannot be made without the approval of Parliament. We are therefore doubtful whether, even in suggesting a limit of £10,000 last year, we did not go further than the Constitution allows. (1922 Report)



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**478.** In 1923 the Treasury recommended and the Public Accounts Committee approved the following plan:

> Where it is proposed to make a gift of public stores or property not requiring replacement, either of an unusual nature or exceeding £10,000 in value, the Treasury will present to the House of Commons a Minute giving particulars of the gift and explaining the circumstances. Treasury assent to the gift will not be given until fourteen days after the issue of the Minute, except in cases of special urgency.

**479.** The general subject of power to make gifts was considered by the Canadian Public Accounts Committee in 1950 but without any recommendation being made. Up to the end of War II it was the practice to regard the Governor in Council as enjoying a discretionary power to make gifts of public property. Since then, the trend has been to authorize by legislation. For example, section 5 of the Surplus Crown Assets Act, c. 260, R.S., permits the Minister of Defence Production, "with specific or general authority from the Governor in Council", to dispose of surplus Crown assets "either gratuitously or for a consideration". Section 3 of the Defence Appropriation Act, 1950, empowers the Governor in Council to transfer defence equipment or supplies to NATO countries "upon such terms and conditions, if any, as the Governor in Council may specify." A general authorization was enacted in 1951 when the FA Act provided that:

> **97.** Subject to any other Act of Parliament, no transfer, lease or loan of property owned by Her Majesty in right of Canada shall be made to any person, except in accordance with regulations or on the direction of the Governor in Council.

**480.** Audit Office practice now is to draw to the attention of the House of Commons any substantial gift of public property whenever made without a concurrence of the Governor in Council being of record, or where doubt is entertained as to the existence of authority to part with the goods, etc.

**481. The Audit Task.**—As already noted, section 67 of the FA Act requires that examinations be regularly made to establish whether:

> essential records are maintained and the rules and procedures applied are sufficient to safeguard and control public property.

The link between this and the reporting directions in section 70 is that, broadly regarded, an irregularity in the use or disposal of public property is the equivalent of an appropriation being applied "in a manner not authorized by Parliament".

**482.** The sufficiency of the system and the state of the accounts are of particular concern in the audit, it being regarded by Parliament that the application given to public property is an Executive matter within the discretion of the holding department. More than once the British Public Accounts Committee has pointed to the parliamentary interest being in accounting practices while stores are warehoused. Auditors sometimes go beyond that to ascertain what controls are exercised after issue, but the continuing parliamentary interest is in the adequacy of the accounting system.

**483.** *The Words "Safeguard and Control".*—The word "safeguard" is obviously referable to safekeeping and so requires auditors to consider departmental practices to protect against risks originating in such causes as: (*a*) frequent changes

in stores staff establishments, (*b*) divided or remote disciplinary control, (*c*) structural defects in layout that permit too ready access to stores, etc., and (*d*) climatic and fire hazards. In this regard the role of the auditor is that of observer interested in preventing something objectionable from happening; therefore, any weakness, whether actual or potential, is to be brought forthwith to the notice of the appropriate administrative officers.

**484.** The word "control" in Accounting means proper receiving, recording, safeguarding and issuing processes. So regarded, an intent in section 67 is to indicate an audit obligation to take into consideration such things as the practices employed to ensure that (*a*) inventories are maintained at the lowest point consistent with current requirements, and (*b*) slow-moving, defective and obsolete items are automatically disclosed.

**485.** *The Words "Public Property".*—There is no definition in the Act of "public property" but the Audit Office view is that the intent is to include land, buildings, machinery, moveable equipment, materials, supplies, farm produce (and equivalent) whether held for administrative requirements or for disposal by sale or otherwise.

**486. Land Records.**—The regularity of acquisition of real property is a matter within the scope of expenditure audits. In the public property audit the concern is with respect to (*a*) the existence of suitable records, (*b*) making certain that title deeds, etc., are properly safekept, and (*c*) establishing that no sales or transfers were made without authority.

**487.** Section 7 of the FA Act vests in Treasury Board a power to make regulations "respecting the keeping of records of property of Her Majesty" and the Board made Crown Land Registry Regulations in May 1956. These direct that the Department of Public Works maintain a Central Land Registry and that each department also keep records of any lands under its control.

**488.** The audit interest generally will be in: (*a*) the sufficiency of the central and departmental records, and (*b*) observing whether departments promptly report additions to and deletions from their records to the Central Land Registry. A department is expected to maintain records of all lands it controls or administers but Treasury Board regulations currently exempt from the Central Land Registry the following: Indian reserves, unsurveyed lands in the Yukon and Northwest Territories, land for lighthouse purposes, leasehold interests, railway lands and Prairie Farm Rehabilitation Act lands held for irrigation canals or conservation works, and also irrigated lands covered by agreements for sale.

**489.** Where it is observed that the administration of land is transferred from one department to another, either by specific statute or, for example, by order in council made under the authority of the Public Service Rearrangement and Transfer of Duties Act, c. 227, R.S., auditors should ascertain that appropriate corrections are made in the records of the departments and in the Central Land Registry.

**490.** Departmental and central records should suitably describe properties and indicate where title deeds are held. Land is not usually included in the Statement of Assets and Liabilities (but there are some exceptions) so it is often useful to have cost or estimated value at time of acquisition entered in the control records.

**491. Stores Accounting and Inventories.**—The general direction is given in section 57 of the FA Act, which reads:

> **57.** Every department shall maintain adequate records of stores and the appropriate Minister or such other authority as the Governor in Council may direct may make rules and give directions governing the acquisition, receipt, custody, issue and control of such stores.

While section 58 makes the Comptroller of the Treasury responsible for any revolving fund account for acquiring and managing stores, a department is always answerable for the efficiency and adequacy of stores accounts. The position in Canada is the same as it is in England where the Public Accounts Committee has declared that:

> From first to last, the department that provides, keeps, and supplies or uses the stores ought to answer for them, and for what is done with them, so long as they remain in its hands, and for this purpose must keep accounts, and take stock of them.

**492.** *Treasury Board Definitions.*—Section 62 of the FA Act provides that Treasury Board issue definitions for various expressions used in the Public Stores Part of the Act. Among these are:

> *Stores* and *Materials* mean all types of moveable property, material and supplies, whether of a permanent or expendable nature, held in stock under the custody of a storekeeper by a department for issue on demand or for sale to its various administrative and operating units, to other departments, or to the public.
>
> *Direct Issues* means all types of moveable property, material and supplies whether of a permanent or expendable nature, purchased for direct delivery to points of consumption and not recorded through the stores accounting system.
>
> *Issue* means the withdrawal from stock of stores and materials pursuant to a properly authorized requisition.

**493.** *Valuations.*—A Treasury Board directive suggests that stores transactions be recorded in quantities rather than in quantity and dollar values. The directive does require values to be stated in applications for deletions from stores inventories. This is, of course, necessary where procurements are through a revolving fund, the governing direction being section 59 of the FA Act:

> **59.** All accounting transactions with respect to a revolving fund under this Part shall be recorded at cost, but for the purpose of valuing stores or materials on hand at the time the revolving fund is established and of valuing inventories and issues of stores and materials, cost may be determined in accordance with such recognized accounting practices as the appropriate Minister with the approval of the Treasury Board, may direct.

**494.** It will be observed that the discretion is ministerial, subject to there being consistency in application of accounting practices by departments (presumably the reason for the reference to Treasury Board) and that cost determinations be founded on "recognized accounting practices". Alternative accounting treatments, however, may be selected and an auditor may be consulted so the Audit Office view is now given: Rarely are departmental supplies stocked for sale;

therefore, the commercial valuation principle of 'cost or market whichever is the lower', etc., is not ordinarily applicable in valuing public inventories. An English research study (*Public Authorities' Stores, Small Plant and Tools Accounting and Control*) notes that LIFO practices are "to create a hidden reserve for use in future years", consequently:

> We must reject LIFO costing for public authorities accounts, because, in our view: (*a*) it is inappropriate, and (*b*) to the extent that it is consciously used to create a hidden reserve, it may be illegal. (p. 55)

Where values are used, Audit Office preference is for averaged cost, with transportation and other procurement costs taken into calculation when establishing values of inventories and issues—this does not preclude adding a surcharge in the event of a sale. Where a revolving fund is not involved and a department has no other compelling need for a record of values, Audit Office preference is for control by quantities.

**495.** *Dimensions and Nature of Inventories.*—Where stores are regulated by use of a revolving fund the value of holdings at the year-end is of audit concern but, with respect to stores generally, interest is in administrative practices and procedures. A view long ago accepted by the British Public Accounts Committee still has relevance:

> The department that administers a stores service is responsible for the proper stores being procured, in point of character, cost, quality and quantity, for their safe custody pending use and for their being used for the right objects, so long as they remain within its jurisdiction. The public is not concerned with where the stores are, so long as the right stores have been economically bought, are forthcoming in good order when wanted, and are being economically used. (Treasury Minute, 19 October 1894)

Thus the British audit is essentially of administrative practices with a duty to draw to the attention of Parliament any grave defects in the system of control. However, since 1907 the British Public Accounts Committee has expected that the Auditor General also call attention to cases of obsolete and unserviceable stores holdings and to cases where it would appear that there is an excess of stores beyond normal prospective requirements. Canadian Audit Office practices are founded on the foregoing.

**496.** *Stocktaking of Inventories.*—Unless stores are taken into a financial statement, no obligation rests on the Auditor General to certify to the amount of holdings. The examinations of records and tests of inventories are to ascertain the reliability of administrative accounting records. Should an unsatisfactory state of affairs be observed, the appropriate departmental officers are to be forthwith informed because the obligation to make a complete examination is not on the Audit Office but on the department concerned. In other words, the audit obligation is to report when an examination discloses (*a*) significant deficiencies, (*b*) laxity or inefficiency in stores administration, or (*c*) unsatisfactory supervisory control.

**497.** The fact that there are shortages or overages need not be disturbing, so long as they are not unreasonable in quantity or value and there is no intent to conceal the state of affairs existing. The accounts are under audit less to

establish a state of absolute accuracy than to provide a test of the administrative efficiency of the stores system—that is the matter of prime interest to Parliament. From this viewpoint, a quotation from King's *Public Supplies* has pertinence:

> It is of the greatest importance, to ensure smooth and efficient administration, that supplies officers and their colleagues in the accounting branches should endeavour to establish a harmonious personal relationship. It is essential that complete candour should exist between the two branches. Mistakes in execution (and in accounting) are inevitable from time to time, deficiencies and losses from theft, too, are bound to occur. If candour persists, these occurrences will at once be brought to the attention of the accounting side, and not only can the two sections in co-operation try to trace the source of the trouble but also improved measures may be invented to prevent recurrence. (p. 85)

**498.** *Control of Equipment.*—Buck, after surveying state and municipal practices in the United States, remarks that:

> Considerable argument has arisen over the question as to where the line should be drawn between equipment and supplies. It now seems fairly well agreed that the term equipment . . . should be applied only to those things which have an appreciable and calculable period of usefulness. The minimum period of service for any piece of equipment has been more or less arbitrarily fixed at one year. Of course, the useful life of any equipment depends upon how it is handled and the care that is taken of it . . . Hand tools, particularly those that are easily worn out or lost, are often classified as supplies. (*Public Budgeting,* p. 207)

Audit interest goes beyond classification because, in view of the permanent nature of various items of equipment, recording of receipt and issue is but a step in property management. Records maintained should be of a nature to establish the degree of efficiency in utilization. An auditor is interested, among other things, in whether: (*a*) the department's records give a description of each piece of equipment of significance, its location, and identifying mark wherever it is practical to mark; (*b*) transfers within the department have proper authorization; and (*c*) there is adequate procedure in effect to bring on charge equipment that is manufactured in workshops of the department.

**499.** Auditors of equipment accounts (as well as those of supplies) review procurement practices only to the extent necessary for the purposes of the audit they are making. Of course, general reviews are to be made of departmental practices relating to inspection and acceptance of deliveries, recording and identification, stocktaking, disposals and, where relevant, valuation practices.

**500.** *Containers.*—Where containers are returnable, the stores control system should provide for suitable recording and also for appropriate storage until returned. Also, where demurrage is charged on containers after a specified time, a test should be made to establish whether containers are returned on a 'first-in first-out' basis.

**501.** *Returns to Stock.*—Complete relationship between appropriations and utilization of stores acquired as a charge thereto is to be expected, otherwise there is a risk of carelessness in administration and indirect supplementing of a vote. For example, failure to bring on charge materials acquired or issued for a works project, and which remain on hand upon completion of the project, may result in either a loss of stores or the surplus being applied to other projects without a control being exercised. The latter would be the equivalent of supplementing a vote by irregular departmental action.

**502.** *Stores Held for Other Departments.*—Strictly regarded, duplicate records should be maintained, but the essential is that there be at least one record that does control the stores. Of course, it is to be expected that the stores are suitably segregated from other like stores of the department holding custody.

**503.** *Rejected Deliveries.*—The British Public Accounts Committee once emphasized that:

> notice should be given to a contractor as soon as his goods have been rejected, and that he should be required to remove them within a certain time, at the expiration of which all responsibility for them on the part of the department would cease.

If a department takes no immediate action and rejected goods remain on public property, it is desirable that they be provisionally taken on charge because, so long as goods belonging to others are in the control of a public authority, a liability to the owner may exist; the degree may be minor but it is not to be ignored. There is also the risk of the goods being used to cover up shortages.

**504.** To illustrate the general position in law an unusual case will be used. During World War II the British War Office requisitioned a house but agreed that the owner could use one room as a store-room. No listing of the stored articles was given but the room was locked and sealed in the presence of representatives of the War Office. Later, articles were stolen by civilian occupants of the house. The War Office was held liable on the ground that the standard of public care expected was the reasonable care a man would take of his own property and the Government's officers had not shown that degree of care. (*Blount v. The War Office*)

**505.** *Property Acquired by Seizure or Forfeiture.*—For various reasons but generally because of an infraction of the law, a department sometimes comes into possession of seized property. The application directed to be given is not invariably the same, therefore the pertinent statute should be reviewed. However, the auditor has limited interest in the rights of the persons involved; his concern is whether a suitable record was forthwith established, the property suitably safeguarded, and then dealt with in the manner provided by the statute applicable.

**506. Write-offs.**—Stores accounts should truly reflect holdings, therefore the records should clearly portray what was the nature of the authority relied upon to make adjustments consequent on losses or deficiencies, errors, condemnations, etc. A stores accountant should make certain that the accounts reflect every write-off action directed to be taken.

**507.** *Boards of Survey.*—Subsection (1) of section 60 of the FA Act requires that at least once in every five years a board of survey enquire into the state of the stores under the management of each department. The size of the board is in the discretion of the Minister, who may establish more than one. Subject to the terms of appointment and departmental rules, members of a board of survey may continue to function from year to year.

**508.** It is not necessary that the board consist wholly of officers of the holding department but it is obviously desirable that none has direct association with the administration of stores under review by the board. Audit notice should be taken of the procedure adopted for convening the board, because the public interest may be inadequately protected where an interested person is in position to decide the time when the board is to meet.

**509.** A board of survey is to enquire into "the state of the stores" under the management of a department. In performing that task the board is necessarily concerned with the state of the stores records, but no store accountant should await a survey when aware, or he has reason to suspect, that stock differences disclosed by a departmental stocktaking are due to bookkeeping errors. Appropriate action should be taken forthwith, but it is to be expected that the department's board of survey is informed of the state of affairs whenever errors were numerous or substantial quantities were involved.

**510.** *Deletion Authorizations.*—Section 60 (2) of the FA Act directs that:

> **60.** (2) Where a board of survey constituted under subsection (1) recommends the deletion from inventory of any obsolete or unserviceable stores or materials or any stores or materials lost or destroyed, the appropriate Minister with the approval of the Treasury Board, may direct the deletion of all or any part of such stores or materials from the inventory, but the value of stores or materials so deleted shall not be credited to a revolving fund except with the authority of Parliament.

It will be observed that a write-off by reason of obsolescence, natural wastage or condemnation requires acceptance by the Minister (which includes his deputy head) of the board's recommendation. In turn, a decision of the Minister to accept the report requires concurrence by Treasury Board before a correction may be made in the accounts. Collectively, the aim is to protect against a purported write-off being, in fact, a means to cover up an indefensible deficiency without appropriate remedial action being taken.

**511.** The text of the subsection is a little ambiguous, consequently Treasury Board has directed that:

> the subsection should be interpreted as a means of keeping the Board informed only of deletions from stock and inventory records of obsolete items, items lost or destroyed, or which become unserviceable under circumstances other than those in the course of normal use or carrying out the purpose for which the stores were procured. (Directive, 19 January 1956)

This directive requires that "normally" authority for write-off be obtained prior to disposal of the items, but in special circumstances—an example would be a quick sale to avoid costs of custody or moving from a remote site—application may follow actual disposal "where it is advisable or more economical to do so".

**512.** *Division of Responsibility.*—As the head of a department, the Minister is answerable to Parliament for flaws in system that have resulted in losses, etc. However, when, in accordance with section 70 of the FA Act, the Auditor General reports to the House of Commons that:

> there has been a deficiency or loss through the fraud, default or mistake of any person,

the reference is to some departmental officer or employee. Where access to stores is inadequately controlled, it may be the storekeeper who is answerable, but not infrequently he is subject to the directions of a more senior officer. In that event it may be regarded that the storekeeper is responsible for the accounts and some other officer for physical holdings. A quirk that an auditor may not overlook is that sometimes the spirit of co-operation between divisions of a department may be more prevalent among the lower ranks of its hierarchy; consequently, flaws and gaps in safeguarding often take their origin in divisions of administrative responsibilities. It is for that reason an auditor is expected to evaluate and observe departmental allocations of duties and responsibilities.

**513.** Where safekeeping facilities are sub-standard, it may be that the department has the authority to take remedial action; in other cases, joint action with another department—often the Department of Public Works—may be involved. Because of a failure to remedy a physical deficiency a loss may occur and the question arises: Who is answerable? The Audit Office view is that the deputy head of the department in possession of the stores is under the obligation to prove that he had acted reasonably to protect against loss. To illustrate, in 1923 the British Public Accounts Committee considered a theft from an outmoded safe. The conclusion was:

> The provision of strong rooms and safes is a responsibility of the Office of Works; but it rests with the head of a department to satisfy himself that the accommodation, when provided, is adequate for the purposes of his department, and, unless he makes a formal written protest, he cannot plead defective accommodation in extenuation of any loss that may subsequently occur.

**514. Responsibility for Issues.**—The only Act now pinpointing responsibility for stores on issue is the National Defence Act, c. 184, R.S., which provides that:

> **38.** The conditions under which and the extent to which an officer or man is liable to Her Majesty in respect of loss or damage to public property shall be as prescribed in regulations.

In all other cases, the onus is on the person to whom the issue was made to demonstrate that any loss was not due to his fraud, default or mistake.

**515.** *Thefts and Irregularities.*—It is to be expected that there is documentation of every step in stores operation from the initial receipt to final disposition. Quoting an English text writer:

> . . . it is an important part of an auditor's responsibility not only to satisfy himself (and the public) that public moneys have been lawfully spent, that proper accounts have been kept, but that also there has been no loss or deficiency due to negligence or misconduct. It follows that records and documents must be kept and produced not merely for the purposes of transacting business and getting things done but also to satisfy the requirements of audit—in other words, to provide proper evidence for the purposes of public accountability. (King, *Public Supplies,* pp. 112-3)

**516.** A misappropriation by a servant of the Crown is, from the public viewpoint, a more serious matter than when the act is that of an outsider. No adjustment in accounts arising out of a fraud of a public employee should be made without Executive sanction. Section 98 of the FA Act requires losses due to

fraudulent acts to be reported in the Public Accounts, therefore any adjustment of stores accounts by reason of fraud should be made only with the concurrence of Treasury Board.

**517. Sales of Stores.**—Ordinarily, resale is not contemplated when a department acquires stores; however, sales sometimes result. In the absence of a prohibitory provision in a statute, the essential is that the price be fair:

> no department is at liberty to dispose of commodities which it holds for the public at a price which is not the best that can be obtained from the general public without, at any rate, the previous authority of the Treasury.

This was the view taken by the British Public Accounts Committee in 1924. Applying it to a sale by a Canadian department, 'Treasury' would read 'Treasury Board'. Original cost is not necessarily the standard—it may be more or less, depending on current demand, location, etc. There are exceptions from the foregoing, one being Service Forces stores, where 'catalogue' rates are treated as applicable.

**518.** Where stores represent production—for example, products of an experimental farm—sales at going prices are matters within departmental discretion, but appropriate rules are to be expected to regulate sales to members of the department, because of the risk, or suspicion, of partiality.

**519. Gifts for Administrative Purposes.**—Sometimes stores are distributed to promote an administrative policy. An illustration might be a distribution of food or medical supplies by a department having a special interest in promoting the welfare of a class. If a distribution, in effect, accomplishes a purpose within the discretion of a department, it is permissive.

**520. Inter-Departmental Transfers.**—In the absence of a statutory prohibition, a department may make stores available to another department—a like discretion does not exist with respect to 'surplus Crown assets', as defined by the Surplus Crown Assets Act. Reference is now to items periodically required by a department but currently held in quantities in excess of immediate need.

**521.** An auditor need not regard the word "transfer" in section 97 of the FA Act as applicable to a loan on basis of ultimate replacement, because no real conveyance of property takes place, i.e., since ownership remains in the Crown, it is only the management which passes from one Minister to another. A consequence, of course, is that resources of the recipient department are increased; therefore, it is to be expected, where value is substantial, that an Executive order approve the transfer. When a branch of the public service is transferred from one department to another, application of the Public Service Rearrangement and Transfer of Duties Act regulates transfer of related stores, unless some other Act gives directions.

**522. Stockpiling.**—Legislation sometimes provides for the acquisition of strategic materials for stockpiling or for the maintenance of reserves for an emergency. Where stockpiling is to safeguard against the contingency of scarcity

and unavailability of certain supplies in the future, the legislation removes or suspends a monetary control normally applicable to the Crown, i.e., its dependence on annual grants of supply. In theory, it may be argued that such stocks should be held until an urgent need and a 'scarce' situation eventuate but, in practice, that may be neither sound nor desirable. The Audit Office view is: In the absence of a direction to the contrary, it is within the discretion of the Crown to draw on a stockpile whenever that is considered desirable. The essentials are: (*a*) the items be segregated from ordinary inventories, and (*b*) ministerial sanction of use be of record because public policy is involved.

**523. Revolving Funds.**—Section 58 of the FA Act now permits a revolving fund scheme to be operated by any department upon Parliament fixing the sum to be available for the revolving fund, i.e., the maximum amount by which the charges to the fund may exceed the credit to it at any time. All accounting transactions are to be recorded at cost (section 59).

**524.** The purposes of a stores revolving fund are primarily: (*a*) to provide for orderly purchasing and control of bulk purchases needed by more than one division of a department or where the activities of a single service are varied, (*b*) to provide a means whereby votes are charged on a stores-consumed basis where this provides the effective parliamentary control, and (*c*) to facilitate stores financing whenever departments are operating with interim supply.

**525.** *Charges to Revolving Funds.*—The regularity of a charge to a statutory revolving fund is dependent on stores being of a type that ultimately may be a legal charge to some vote. For example, various departments may appropriately stock rifles and shot guns, but it would be unusual were a machine gun stocked by any department other than National Defence or the R.C.M.P.

**526.** *Year-end Position.*—The application given to a revolving fund does not relieve a department of its dependency on Parliament for grants to absorb charges for supplies used. For example, audit notice is to be taken where a charge is left at the year-end in a revolving fund account although deliveries were made to a service. It would also be an irregularity were a revolving fund temporarily used to finance final expenditures—the financial resources of a stores revolving fund should not be employed except to acquire stores later to be issued for use.

**527.** Section 58(5) of the FA Act provides the basis for calculating any annual profit or loss on transactions recorded through a stores revolving fund account. The section directs that if a profit results, the amount is to be transferred to the credit of Revenue; but a loss may not be written off to Expenditure without specific parliamentary authority. The Office view is that this direction should be also utilized when revolving fund accounts established for the purposes of other statutes are involved.

**528. The Investment in Stores.**—A truism is that stated by Durell:

> Stores are really cash in another form, and, subject to certain natural modifications, it is but reasonable from the public and parliamentary point of view that they should be treated

on the same principles. Parliament in granting the money to purchase stores, does so on the understanding that the stores shall be used for the purposes for which they are intended when the grant is asked for. Any other application of them is as much a misappropriation as if the grant itself were applied to another purpose than the purchase of stores. (*Parliamentary Grants,* p. 345)

There is an audit duty to take notice when stores acquired as a charge to one vote are used for the purposes of another because that is the equivalent of virement between votes.

**529.** There is also some obligation on the Auditor General to take notice whenever the size of a department's inventories is materially in excess of current needs. A reason is that stores may provide a reserve that detracts from 'the power of the purse' exercisable by Parliament. Also, there is the question of administrative cost because first is not final cost when supplies are warehoused. An article in the June 1953 issue of *The Accountant* states that a breakdown of stores handling costs to a business firm normally approximates:

| | *Per cent of cost of total stock* |
|---|---|
| Obsolescence | 10.00 |
| Interest on capital invested in the stock | 4.50 |
| Spoilage, physical deterioration or its prevention | 3.00 |
| Handling and distribution | 5.00 |
| Insurance | .12 |
| Storage facilities | 1.00 |
| Clerical | 2.00 |
| | 25.62% |

Obsolescence and spoilage percentages indicate the prudence of keeping holdings to a reasonable minimum. What that is depends on the nature of departmental activities, but a British Treasury publication (*Stores Accounting and Provisioning Procedures*) provides a lead when it points out that:

In the Service Departments the margin is high representing for many items from six to twenty-four months' consumption but in the Civil Departments, where economy in stock-holding is the more important factor and running out of stock does not involve lives or strategy, the margin is low—an average of three months' consumption.

**530.** What is a reasonable inventory is a matter of opinion, but the Audit Office regards an annual report of the London County Council as including interesting observations. Its Supplies department annually spends over £6 million and stocks about 20,000 items, and one comment is:

The department tries to hold a sensible balance between perfectionism and miserliness. Obviously it would be wrong as well as foolish to aim at a standard whereby the department could forthwith supply from the shelves of its warehouses any article in any size on demand. Modern business has rejected such a policy as uneconomic. Under present conditions with present day prices a great departmental store which tried to run on such a policy would not survive. The Supplies department stocks are kept to minimum not maximum working loads and yearly there is a ruthless clearing of articles where the demand is such that it is not economic to carry stocks. Further, customer departments are constantly pressed, where stocks are carried at their request, to take action which will result in stocks being reduced.

**531.** In this aspect of the audit the obligation is to observe rather than to judge; nevertheless, it is to be constantly borne in mind that extravagance in use of public funds may constitute an unlawful charge to a vote. The illustration used is drawn from English records because district auditors are required to disallow, and surcharge for, any expenditure "which is contrary to law". An automobile was purchased for the use of an officer. The auditor took no exception to the purchase of a car, but he regarded the type of car acquired as being superior to practical requirements. The conclusion reached was:

> if excessive expenditure is incurred the difference between what is reasonable and what is excessive is unlawful. In other words, if the motor car provided is an expensive luxury car instead of a car reasonably in accordance with the use to which it is put, the difference in expenditure is unlawful. (Administrative Ruling)

**532.** Holdings sometimes may represent outlays not necessitated by immediate need but because money was available in votes. Many years ago the British Public Accounts Committee rejected a £150,000 stores purchase that was defended by the Navy because (*a*) a favourable state of the market existed and (*b*) the money was not needed for any other purpose so would have lapsed. The Committee's decision was that the purchase:

> however advisable from the point of view of economy, it was not within their right to make.

**533. Surplus Crown Assets Act.**—This legislation has as its aim the salvaging of the residual value of public property no longer required by a department. The selection of stores to be declared surplus is within the discretion of Ministers over departments, but once that is done decisions as to disposition are those of the Minister of Defence Production, although by section 4 the department continues to be responsible for custody until it surrenders possession or control thereof pursuant to the order of the Minister or the Crown Assets Disposal Corporation. The statute consequently is 'housekeeping' in purpose, with the powers vested in the Minister of Defence Production taking the place of those previously enjoyed by departmental heads.

**534.** The Act provides that the Minister may, with specific or general authority from the Governor in Council, either directly or through the agency of Crown Assets Disposal Corporation,

> sell, exchange, lease, lend or otherwise dispose of or deal with surplus Crown assets either gratuitously or for a consideration and upon such terms and subject to such conditions as he may consider desirable.

Therefore, once the Corporation takes custody, Part V of the FA Act no longer applies and the audit is of the application given to the Surplus Crown Assets Act.

**535. Office Furniture and Equipment.**—Office furniture that becomes surplus to a department's needs is returnable to the Department of Public Works which, if the articles are not regarded as suitable for retention to meet anticipated needs of other departments, is responsible for declaring them surplus for purposes of the Surplus Crown Assets Act. Similarly, office equipment items no longer required by a department are returnable to the Department of Public Printing and Stationery for re-issue or surplus declaration.

## The Audit of Crown Corporations

**536.** No Act of Parliament creating a Crown corporation gives directions as to the nature of the audit report, therefore section 87 of the FA Act has general application:

> **87.** (1) The auditor shall report annually to the appropriate Minister the result of his examination of the accounts and financial statements of a corporation, and the report shall state whether in his opinion
>
> (*a*) proper books of account have been kept by the corporation;
>
> (*b*) the financial statements of the corporation
>
> (i) were prepared on a basis consistent with that of the preceding year and are in agreement with the books of account,
>
> (ii) in the case of the balance sheet, give a true and fair view of the state of the corporation's affairs as at the end of the financial year, and
>
> (iii) in the case of the statement of income and expense, give a true and fair view of the income and expense of the corporation for the financial year; and
>
> (*c*) the transactions of the corporation that have come under his notice have been within the powers of the corporation under this Act and any other Act applicable to the corporation;
>
> and the auditor shall call attention to any other matter falling within the scope of his examination that in his opinion should be brought to the attention of Parliament.

**537.** No boundaries are defined regarding the scope of the audit but expressions such as "that have come under his notice" and "falling within the scope of his examination" indicate that examinations may be in accordance with generally accepted auditing standards and practices, review being as comprehensive as is necessary to permit a report in accordance with the requirements of section 87. In addition, auditors note any policy decision, administrative transactions, etc., which may merit ministerial or parliamentary notice.

**538. The Accounting System.**—In a few instances Parliament has given accounting directions; for example: (*a*) the National Harbours Board Act, c. 187, R.S., requires that separate accounts be kept for each harbour under the Board's administration, although the statement certified is a consolidation; (*b*) several statutes include directions to credit profits to reserves, and (*c*) various Acts stipulate that systems of accounts be "satisfactory" to a particular Minister. Where no accounting directions are given, section 85 (1) of the FA Act applies:

> **85.** (1) A corporation shall keep proper books of account and proper records in relation thereto.

This is addressed to Management but the next subsection makes the annual financial statements

> subject to such directions as to form as the Minister of Finance and the appropriate Minister may jointly give.

Therefore, because of the emphasis parliamentary committees tend to place on accounting records being comprehensive and well kept, some Minister is, by

implication if necessary, assumed to have a duty to make certain that they are. Where the ministerial power to intervene is inferred, the Australian Public Accounts Committee has decided that it is the Commonwealth Treasurer because of the functions of his department. This is not binding, and the problem has not arisen in Canada, but if it should, the Minister of Finance would at least be one of the Ministers immediately informed were a corporate bookkeeping system below standard.

**539.** *The Audit Status.*—The FA Act does not define what are "proper books of account". Broadly regarded, the bookkeeping records should be such as will explain transactions adequately. The Audit Office is always ready to co-operate with Managements in developing and improving accounting systems, but the Auditor General never assumes that he enjoys a right to insist on the adoption of a certain procedure.

**540.** The point has never been specifically in issue in Canada but Commonwealth parliamentary thought, where it has arisen, is that it is desirable that auditors of public corporations strive to maintain an independent and, where necessary, a critical approach with respect to bookkeeping practices and procedures. The illustration now used followed an exhaustive review by the Australian Public Accounts Committee in 1954-55 of the affairs of a statutory corporation of the Commonwealth. The bookkeeping had been so inadequate (mainly because of staff problems and the geographic distribution of its activities) that the Auditor General had, in more than one year, refused to certify the accounts. It was contended that he should have forthwith undertaken the task of getting a proper system into effect, but the Committee thought otherwise:

> We are impressed by the view of the Auditor General that he, as the auditing authority, should have no responsibility for laying down accounting systems for statutory corporations. It is difficult for him to exercise the appropriate critical scrutiny of accounting procedures if he is in the first place expected to lay down those procedures in detail. We therefore agree with the views he expressed that his responsibility lies in the audit of the accounts, in making the appropriate reports to the Parliament and the Minister, and in reporting on non-compliance with proper procedures, but not in instituting them.

**541.** Of course, whenever the Auditor General certifies that in his opinion proper books of account have been kept, he cannot escape a share of responsibility should any material weakness in system or procedure be subsequently exposed. Due care must be exercised by auditors in the review of systems to make certain that there are no serious defects and, if any be observed, that they are noted forthwith.

**542. Internal Control Practices.**—There is direct audit interest in the efficiency of a corporation's internal control practices, particularly in the extent and skill brought to bear in the application of internal audit after entries are made. As Irish points out:

> An advantage of internal audit is that it usually results in transactions being checked more promptly than under the independent audit. In addition, it enables the professional auditor to have less regard for detail and so to concentrate more on matters of principle. (*Auditing Theory and Practice,* p. 29)

Also, in one of the addresses delivered to the 1957 International Congress of Accountants it was stressed that an external auditor's responsibility is to the public; but he may

> rely to a large extent on the internal auditors in determining whether the system of internal check is operated satisfactorily and in assessing the general reliability of the accounting records.

The FA Act requires Crown corporations' statements to be certified within three months after the fiscal year-end; therefore, when opinion is that the internal audit has been competently performed and that the system of internal check is adequate, the Office anticipates that auditors direct their attention to work that is associated with the verification of the year-end financial statements.

**543. Financial Statements.**—The directions to the corporations are set out in section 85 (2) of the FA Act:

> **85.** (2) Subject to such directions as to form as the Minister of Finance and the appropriate Minister may jointly give, a corporation shall prepare in respect of each financial year statements of accounts which shall include
>
> (*a*) a balance sheet, a statement of income and expense and a statement of surplus, containing such information as, in the case of a company incorporated under the Companies Act, is required to be laid before the company by the directors at an annual meeting, and
>
> (*b*) such other information in respect of the financial affairs of the corporation as the appropriate Minister or the Minister of Finance may require.

**544.** The opening words "subject to" leave to the discretion of the Ministers whether they give instructions or not; when they do, the corporation must conform. However, the instructions being limited to matters of form, the corporate Management is answerable for the substance of the statements. It will be observed that the Ministers jointly participate for purposes of subparagraph (*a*), but may act independently for the purposes of (*b*).

**545.** *Changes in Basis of Presentation.*—Section 87 requires that the audit report state whether the financial statements

> were prepared on a basis consistent with that of the preceding year and are in agreement with the books of account.

This is not to be regarded as freezing the mode of compilation and presentation. It will be observed that the instruction is addressed to the auditor, not to the corporation. A purpose of the direction is to provide notice to readers whenever any material change in presentation has been made.

**546.** The principal aim is to encourage consistency, but not to the extent of impeding changes resulting from improvements in accounting techniques or changed conditions. The doctrine of consistency contemplates that the rules of accounting be continuously observed and that accounting concepts and conventions be consistently applied. Yorston, Smyth and Brown give this illustration:

> It may not be of the utmost importance whether the method of allocating materials to job contracts is determined on the basis that the first goods in are the first goods to be disposed of, or on the basis that the last goods in are the first goods to be disposed of, but it is definitely important that the method adopted should be consistent year after year.

If the first method is adopted at the beginning of an accounting period and the latter at the close of the same period, material differences would result from this inconsistency of accounting practice. (*Advanced Accounting,* vol. 1, p. 11)

**547.** *Disclosure of Payments to Directors and Officers.*—The FA Act requires that the financial statements give at least the same amount of information as a commercial company is required to give. Section 117 of the Companies Act directs that the income and expense statement of public companies disclose, among other things, totals paid (*a*) in fees and emoluments to directors, and (*b*) in salaries or other remuneration to executive officers and also to legal advisers. Crown corporations are not 'public' companies within the meaning of the Companies Act, but a ministerial instruction (given after the FA Act became operative) is that this information be set out on statements of Crown corporations.

**548.** The Companies Act, section 117, was enacted contemporaneously with a parliamentary investigation of price spreads and corporate practices. One recommendation was that corporate financial statements should "show the number of executives and the total amount paid in salaries and bonuses". However, the legislation did not take that precise form, nor does it define "executive officers". The Audit Office assumes that the officers referred to are the president, executive vice-presidents and other officers named in the by-laws, and that the legal expenses to be disclosed are the fees and retainers paid to practising barristers and solicitors (also notaries in Quebec). The direction is not regarded as applying to a salaried officer of the corporation merely because he is a lawyer.

**549.** *"True and Fair View" Direction.*—Section 87 of the FA Act requires that the Auditor General state in his report whether in his opinion the balance sheet and the statement of income and expense give a "true and fair view" of the corporation's affairs. Prior to 1948 the United Kingdom Companies Act required that auditors report whether a statement gave a "true and correct view", therefore the following quotation from Dicksee's *Auditing* has significance:

It is interesting to contrast the phrase 'true and fair view' with the phrase 'true and correct view' which occurred in section 134 of the Companies Act, 1929, in relation to the auditor's report. In this respect, the Companies Act, 1948, appears to be less stringent than the Act of 1929. It is suggested that the word 'correct' is too rigid, conveying as it does the implication that one set of figures alone is correct, and that any conceivable alternative is therefore incorrect. It is hardly necessary to remind the reader that the element of estimate must enter very largely into many figures in both profit and loss account and balance sheet, and that in many cases estimates somewhat different from those actually adopted may be equally legitimate. The employment of the word 'fair' overcomes this objection, and opens the door to a reasonable flexibility. (17th ed., p. 185)

**550.** Jones in *One Thousand Questions and Answers on Company Law* develops somewhat differently the implications of the change when he states:

"True and fair" implies a higher standard of financial presentation than merely "correct" or "in accordance with the books". It also demands a higher degree of imagination and realism in the presentation of the accounts. The spirit and not merely the letter of the Act must be observed. That is to say, if certain information is essential to the display of a true and fair view in the balance sheet, that information must be included, even though not specifically required by the Act or demanded only by the rules of double entry.

To take a simple example: freehold buildings may have stood in the books at £40,000, the figure having been derived from the purchase of two properties at £20,000 each. If one had been sold for £39,000 the asset might be shown in the books at £1,000, but that would not present a fair view. (Question 751)

**551.** The quotations above are referable, of course, to accounts of commercial undertakings with the balance sheet disclosing, among other things, what is available for dividend declarations. But regardless of the aims of a corporation, a balance sheet is:

a mixture of historical and current costs, face values, conventional valuations and arithmetical estimates, all of which have to be reconciled in greater or less degree, when it comes to the current assessment of the present value of proprietorship. (*The Accountant,* December 1946)

The statement would be a jumble were it not for the professional skill exercised by corporate accounting officers and auditors in weighing the pros and cons of alternatives in the light of generally accepted accounting practices and of the special circumstances of each case.

**552.** *Explanatory Notes to Financial Statements.*—Notes are sometimes associated with financial statements in order to provide information that Management considers necessary but cannot conveniently incorporate in the statements. Audit Office practice is to urge that notes be associated with statements only if there be no other alternative means—a risk is that in time they tend to take the form of special pleading. It is preferable that explanatory observations be made part of the corporation's annual report. Audit notice is necessarily taken of any notes specifically identified as part of and to be read together with a financial statement but the audit obligation ordinarily does not go beyond considering whether they may mislead a reader. The subject has no extensive literature but an interesting article in *The Journal of Accountancy* by F. B. Forderhase, CPA, ends with these words:

In conclusion, notes to financial statements are only a tool for disclosure of information which cannot conveniently be included in the statements. Whenever a problem arises regarding disclosure it generally is not one of principle but of significance. The principle of disclosure is fairly simple in that it requires disclosure of any matter necessary to the understanding of the financial statements; beyond that it is a matter of judgment as to what is significant. (October 1955, p. 55)

**553. Annual Reports of Corporations.**—Various statutes and also section 85 of the FA Act require Crown corporations annually to prepare reports for presentation to Parliament. While it is required that the financial statements be included, not infrequently the reports review in some detail the financial transactions of the year with illustrative classifications of income and expense. As a rule, the Audit Office does not preview these reports and there is no audit responsibility with respect to them. However, supervisors draw to the notice of the Auditor General any statement or comment in a report that may be ambiguous to readers not familiar with activities of the corporation—it may happen that the Auditor General will be a witness should a parliamentary committee review the affairs of the corporation.

**554. Reserves.**—Section 84 of the FA Act reads:

> **84.** Subject to any order of the Governor in Council made on the joint recommendation of the Minister of Finance and the appropriate Minister, a corporation may make provision for reserves for depreciation of assets, for uncollectable accounts and for other purposes.

A purpose of the section is to provide flexibility in statement presentation in achieving the legislative aims of giving a "true and fair view"; in other words, to make adjustments for the purpose of establishing a reasonable approximation of the financial position. It can be no more than that because the balance sheet does not purport to give the present realizable value of such items as land, plant, equipment, etc. As the Cohen Committee on United Kingdom Company Law pointed out:

> if a balance sheet were to attempt to show the net worth of the undertaking, the fixed assets would require to be revalued at frequent intervals and the information thus given would be deceptive since the value of such assets while the company is a going concern will in most cases have no relation to their value if the undertaking fails.

**555.** *Provision for Depreciation.*—Because of the nature of the functions and obligations of Crown corporations, it is the Audit Office view that it is of less importance that provision made for depreciation conforms to capital cost allowances for purposes of taxation than that the amount is justified by surrounding circumstances related to current and prospective needs of the corporation. It is, of course, the Office view that there be neither over- nor under-reserving because Parliament would be ill-served were statements presented in a form that might be defendable but which would obscure the current position. To illustrate, because a corporation ends a year with an operating deficit is no reason why suitable provision should not be made for depreciation of capital assets.

**556.** *Reserve Directions by Order in Council.*—In applying section 84, the discretion is with Management, provided there is no order in council. Once the Governor in Council intervenes the corporation must conform. The requirement that two Ministers jointly recommend apparently is of safeguarding nature: the Minister of Finance to weigh the financial soundness and the impact the decision may have on other Crown corporations, while the appropriate Minister's concern is the prospective requirements of the corporation.

**557. Corporate Cash Resources.**—A Crown corporation is never created simply to make money; many do, but that is incidental to attaining the purposes for which established. Like any other corporation, it is prudent to accumulate funds for future expansion, etc.; therefore, where a Crown corporation ends a year in strong cash position, its statements should disclose, to the degree practical, what are the prospective monetary needs in order that it may continue to provide the services for which it has been made responsible by statute.

**558.** A duty on Management is to present financial statements that permit a proper appraisal of consequences to the corporation should a surrender of moneys be directed under section 81 (3) of the FA Act. Subsection (2) of the same section is of no material concern because its purpose is to qualify the Minister of Finance as a temporary depository. The text of interest reads:

**81.** (3) Notwithstanding the other provisions of this section, where the appropriate Minister and the Minister of Finance, with the approval of the Governor in Council, so direct, a corporation shall pay to the Receiver General so much of the money administered by it as the appropriate Minister and the Minister of Finance consider to be in excess of the amount required for the purposes of the corporation, and any money so paid may be applied towards the discharge of any obligation of the corporation to Her Majesty, or may be applied as revenues of Canada.

It seems reasonable to regard cash and securities identifiable with reserves (for example, reserves for insurance) as outside the legislative purpose of the subsection.

**559. Ultra Vires Transactions.**—The words *"ultra vires"* are sometimes used to imply that a public authority is disrespectful of Parliament and prone to ride roughshod over the rights of others. This may sometimes be the case, but generally an *ultra vires* act takes its origin either in unintentional misapplication of a power or because the matter has not been adequately dealt with in a statute. To illustrate how it may happen: The Crown corporation responsible for driveways and parks in Ottawa once operated on a modest budget. After World War II, Parliament decided to develop the national capital on a scale hitherto not practised and the corporation was instructed to acquire thousands of acres of land, assume the obligations of a landlord and act in representative capacity in relocating railway and highway facilities, etc. After observing types of resulting financial transactions, the Auditor General drew the attention of the House of Commons to the risk that new obligations imposed on the corporation might result in *bona fide* transactions that could be challenged as *ultra vires*. Amendments to the Act resulted.

**560.** Commonsense imposes limits on the direction in section 87 of the FA Act that the auditor of each Crown corporation report whether in his opinion

the transactions of the corporation that have come under his notice have been within the powers of the corporation.

It would be unreasonable to regard this instruction as contemplating that audits be so conducted that a lawyer works in association with examiners of accounts. Recorded financial transactions only are involved—the audit obligation does not extend to evaluating decisions within the competence of the corporation or its officers. However, the field being a broad one, some illustrations of types of cases that have provoked controversy are now listed to incite audit curiosity.

**561.** *Business Sidelines.*—In the 1920s the Australian Parliament created a Shipping Board to operate fifty Government ships and also drydocks, shipyards, etc., located on two islands named in the Act. It was a commercial activity with the Act giving the Board power

> to carry on in respect of these islands the business of manufacturer, engineer, dock-owner, shipbuilder and repairer, and any other business incidental thereto or to the said works and establishments.

The City of Sydney invited a dozen firms, including the Shipping Board, to tender for the supply and installation of six turbo-alternators in a power plant the City was constructing. The Board's tender of £666,605 was accepted, whereupon a trade association challenged the power of the Board to contract. The High Court decided that, as the Government enjoyed no general power to manufacture for general commercial purposes, the powers of the Shipping Board were restricted to work performed (*a*) on the islands, or (*b*) for the benefit

of the Government or in connection with ships of the Board. (*Commonwealth v. Shipping Board*). Some time later a Government-owned clothing factory became the subject of like litigation; but in this instance the Government was successful because the prime purpose of the factory was to manufacture Service uniforms and therefore it was related to "defence". (*Victoria v. The Commonwealth*)

**562.** *Undertakings to Act in a Certain Way.*—The Ayr Harbour Trustees had a statutory power to expropriate land, with value to be fixed by arbitration. The Trustees expropriated part of a property and during arbitration proceedings filed a resolution of the Board to the effect that no buildings would be constructed which would bar access to the harbour from land that had not been taken. The arbitrators decided that if the resolution were binding the land taken was worth £2,786, otherwise the value was £4,900. The litigation was with respect to the validity of the resolution. The House of Lords decided that:

> it was not competent to the Trustees to dispense with future exercise of their powers by themselves and their successors. (*Ayr Harbour Trustees v. Oswald*)

The judgment therefore was for £4,900. The same view was taken in New Zealand where a harbour board notified members of its staff that the board would supplement statutory pensions when they were retired and proceeded to accumulate funds in a reserve account. This was challenged and it was decided that the board lacked the power to commit their successors to act in a certain way. The reserve account could stand but the balance at credit might at any time in the future be applied to other purposes. (*Wellington Harbour Board v. Solicitor General*)

**563.** *Statutory Directions re Expenditures.*—The Mersey Docks Board operated under an Act which listed the purposes to which income might be applied, the pertinent section ending with:

> And except as aforesaid such moneys shall not be applied by the board for any other purpose whatsover.

Because of this, the Board contended it was not liable either to local taxes or to income tax on sinking fund income, neither being listed in the section. It failed, the House of Lords taking the view that the obligations of a citizen ranked ahead of the statute's enumeration. (*Mersey Docks v. Cameron*). In this instance a private Act was involved and notice was taken of the subordination of private Acts to general statutes. For that reason, reference is also made to a judicial application given to the Canadian Commercial Corporation Act, c. 35, R.S. Section 8 of that general Act provides that all moneys advanced to the Corporation or received in the course of its business:

> shall be administered by the Corporation exclusively in furtherance of the purposes for which it is constituted.

The Corporation was sued and ultimately judgment was entered against it for $20,000 and costs. Proceedings had originated in a Quebec court and the Quebec Civil Code entitles judgment creditors to interest on the amount of judgments. Because the Crown in right of Canada is not bound by the Code, it was contended that the Canadian Commercial Corporation was not liable, it being an agent of the Crown; moreover, it had no power to pay. It was not successful (*Langlois v. Canadian Commercial Corporation*) as no significance was given to the words quoted; instead, the pertinent enactment was decided to be the section providing that:

> The Corporation may sue and be sued in respect of any right or obligation acquired or incurred by it on behalf of His Majesty as if the right or obligation had been acquired or incurred on its own behalf.

this making the Corporation liable to the ordinary risks of litigants.

**564.** *Statutory Charges to Income.*—An omnibus board operated a bus service throughout a county. When it started operations it had 19 buses, but at the time of litigation had 45, the additions having been financed out of abnormal revenues during War II. The legislation provided that income of the board was to be applied to enumerated objects, one being the "maintaining" of the buses, garages and other facilities, and that, when a surplus remains, it be distributed among the municipal authorities having an interest in the board. The Act also provided that capital outlays were to be financed by borrowings, these to be paid off over a period of years in a manner specified by the legislation. The board contended that the statute contemplated maintaining the service as far as practicable out of current income. The court, however, took a different view: "by no reasonable interpretation can

the word 'maintain' when used in relation to omnibuses include the conception of increase". The judge held that "maintaining" meant keeping the fleet in good working order and in maintaining the original number of buses by buying replacements out of income, but the cost of any additional number of buses was a charge to capital. (*Atty. General v. West Monmouthshire Omnibus Board*)

**565.** *Extravagance.*—The courts have repeatedly decided that an *ultra vires* payment may result whenever a public body is wasteful in applying its funds or acts in irresponsible manner. Audit interest is not so much in the amount spent but rather in the decision to spend because irregularity at that stage is not cured by reason of the corporation ultimately benefiting from the outlay. Two illustrations are given. A college in New Zealand decided to extend a building and to make a portion of it a library. £677 was raised by popular subscription to the end that one of the windows be a memorial to students and faculty members who had served in the forces during War I. The window cost £702, the difference being paid out of college funds. In addition, the college spent £337 for brass plaques giving the names of those commemorated, these being affixed to a wall of the library. The college was a public institute supported by annual grants in the Appropriation Act. The Auditor General took no exception to college funds to the extent of £25 having been spent on the window because an ordinary window would have cost at least as much; however, he surcharged the members of the board for the expenditure on plaques on the ground that the outlay was unlawful. On appeal, it was decided that the college board, having a power to erect buildings, could, within reason, decorate the walls as they saw fit. The case is noted because of a side observation in the judgment:

> One can easily imagine cases in which the Auditor General could and probably would intervene. If the members of the council, in place of these memorial brasses, had affixed to the college library walls tablets of gold on which were inscribed their own good deeds, it would doubtless be held that they had not exercised their discretion honestly and any disbursement of college funds for such a purpose would properly be declared to be of so excessive a character as to go beyond the limits of legality and become an illegal or *ultra vires* payment. (*Victoria University v. Atty. General*)

**566.** The other illustration is British and a somewhat extraordinary one because litigation took the form of criminal proceedings with the public serviced by the corporation really paying the £20,000 fine imposed because it was wholly dependent for income on sales of electricity to consumers in the area with prices adjusted to its costs. Throughout and after War II no person in the United Kingdom could have construction work done without securing a permit from the appropriate Government department. The Yorkshire Electricity Board (a statutory body of the Government) applied to the Ministry of Fuel and Power for a permit and was granted permission to make specified changes to its headquarters building. However, £41,000 worth of work was done in excess of that authorized. Criminal proceedings resulted in the Board being fined £20,000, the chairman (a salaried officer) sent to jail for six months, and the deputy chairman (also salaried) fined £100.

**567.** *Non-Salaried Boards.*—A British board was charged with the duty of granting or refusing liquor licences. In the event of a refusal to renew, the board had authority to grant compensation, not exceeding £100 in a year, out of a fund accumulated by its levies on licence holders. Only expenses incurred by the Board "in the exercise of their function as compensation authority" were permissive charges to this fund. The board was evenly divided with respect to one application; ultimately a fifth member attended and the decision was to refuse. One of the members then wrote a letter to a newspaper to explain his vote, the tenor indicating personal bias in reaching the decision. For this reason a court order annulled the decision. The board had been represented in the legal proceedings and incurred legal costs of £145 which it charged to the compensation fund. This was challenged on the ground that the outlay had not been incurred for a purpose within the meaning of the statute. The judge took a broad view and decided it was a permissive charge:

> It appears to me a matter of public interest that persons called upon to exercise a public duty, and reasonably incurring expenses in endeavouring to support their acts in purported exercise of that duty, should not be mulcted in their private purse, but should be indemnified from public funds. Any other course would prevent individuals from undertaking such a public duty, or would tend to prevent the evidence in favour of the validity of acts done in pursuance of a public duty being adequately presented to the Court. (*Atty. General v. Thomson*)

**568.** *Exercise of Expropriation Powers.*—The powers to take land are regarded as strictly limited to a statutory purpose. Various illustrations might be used; the one now quoted is selected because it is a decision of the Judicial Committee of the Privy Council delivered by Sir Lyman Duff, later Chief Justice of Canada. The City of Sydney, Australia, had power to take land for "the making of streets and for carrying out improvements in or remodelling any portion of the city". It decided to make a major improvement at a busy intersection. The cost being large, decision was to take some adjacent land either to be resold at enhanced prices after the improvement increased values or to be held and leased for income. The right to take this extra land was challenged successfully, the decision including:

> A body such as ... Sydney, authorized to take land compulsorily for specific purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere. (*Sydney v. Campbell*)

**569.** *Where Executive Consent a Requisite.*—Two Canadian illustrations are used. In 1883 Parliament enacted that liquor licences be granted subject to decisions of boards set up by the Government. The Act authorized boards to employ inspectors with salaries to "be fixed by the board, subject to the approval of the Governor in Council". Salaries were to be a charge to a fund accumulated by each board out of licences granted. One board made two appointments and, by letter, informed the appropriate Minister what salary rates it had fixed. No order in council followed because the constitutionality of the Act was being challenged. Instead, all boards were advised to keep salary expenditures within the balance at credit in their funds. More than a year later an order in council issued, it approving salary rates lower than the board had named. Shortly afterwards the statute was declared *ultra vires* and the boards abolished. Having paid salaries at a higher rate than was authorized, the Government ordered that the $942 excess be repaid by board members (who received modest salaries). From this they appealed but the Supreme Court of Canada decided against them. For example, one judge said:

> The salaries of the inspectors could only become a charge on the licence fund after the sanction and approval of the Governor in Council of such salaries had been obtained therefor, and there is no evidence that the salaries as fixed by the appellants were ever approved of as required by the statute, so that any sums of money paid by the appellants without such approval were paid illegally, and the appellants must take the consequences of their illegal action. (*Burroughs v. The Queen*)

**570.** The other case involved the Canadian Broadcasting Commission which enjoyed a power to lease property but subject to the approval of the Governor in Council whenever a lease exceeded a certain period of time or amount of money. The Commission secured the necessary consent to enter into a three-year lease at $12,000 a year. Although no reference was made to it in the order in council, the agreement signed included an automatic renewal clause. At the end of three years the Commission continued in possession, but in January 1938 the new Canadian Broadcasting Corporation gave notice that it was vacating on 15 May. The Judicial Committee of the Privy Council decided that the renewal clause "was plainly unauthorized by the order in council" and dealt with the claims of the owner by applying the law of Ontario with respect to landlord and tenant. (*Gooderham & Worts v. C.B.C.*)

**571.** *Retroactive Salary Increase*—This illustration involves a municipal authority, so it is to be borne in mind that elected representatives were involved. It is included because the court rejected the plea that an *ex gratia* award could legally be made to add to salary paid over a period of years. In 1920, English legislation made local authorities responsible for the collection of motor vehicle licences. The Ministry of Transport notified the authorities that it would reimburse costs incurred and, if the new work added to tasks of staff, the Department would not take exception to salary increases. In Durham County the work was allotted to its accountant who was receiving a salary of £1,700. No increase was granted to him, but in 1925 he was given a general increase of £100. In 1931 a committee of council reviewed licence statistics of the previous ten years and found that in the period £1,575 had been received. It regarded £600 as having been paid to the accountant from 1925 to date and that other expenses of the County had amounted to £275. Whereupon



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the committee recommended that the accountant be given the £700 balance. This was authorized by the council and paid. The auditor challenged the payment as *ultra vires* and the Court of Appeal agreed, one of the judges observing:

> It appears to me that to allow representative bodies, years after the remuneration of their officers has been clearly fixed, to make further payments in respect of past years because they thought that their predecessors had not paid enough, would be most prejudicial to the working of local government and unreasonable in the highest degree. (*In re McGrath*)

**572.** The foregoing illustrations are included to point to types of transactions which have aroused controversy in various parts of the Commonwealth. It does not follow that conclusions reached would be adopted in Canada were transactions, more or less comparable, to arise. For example, the first illustration would not likely be applicable to Polymer because that Crown corporation exists for the defence of Canada—to have available in the event of a national emergency an essential commodity (rubber) not indigenous to this country in natural state. What the illustrations collectively indicate is that experience in litigation points to the view that: (*a*) strict conformity is expected whenever an incorporated body is subordinated, either generally or in special circumstances, to the Executive, and (*b*) any lack of appreciation of public responsibility may result in something more than an administrative irregularity. The Auditor General having to decide whether any transaction be reported, examiners of accounts need not exhaustively explore cases of doubt; they have performed their duty in bringing to his notice any case that arouses doubt.

**573. Special Audit Observations.**—Section 87 (1) of the FA Act ends with the direction that the audit report call attention to:

> any other matter falling within the scope of his examination that in his opinion should be brought to the attention of Parliament.

This direction is referable to matters that do not necessitate qualifying the audit certificate. The words "within the scope of his examination" indicate that, ordinarily, the subject will be one pertaining to finance, and the word "Parliament" points to a subject where the House would feel free to intervene. The reason is that, when Parliament creates a Crown corporation, it is assumed that, by implication, Members and Senators adopt a self-denying ordinance: not to interfere directly in corporate affairs. This removes from audit reports matters that would be appropriate topics were a department involved. By way of explanation, some extracts follow from an oft-quoted speech delivered in the British House of Commons by Mr. Herbert Morrison as Lord President of the Council:

> ... When we set up a public corporation, what are we trying to do? We are trying to get the best of both worlds. ...
>
> ... First, we have a public concern ... in which is invested the public ownership of certain economic undertakings ... Secondly, we try to graft on to that basis a commercial or business management capable of acting with speed, capable of rapid decisions, and a business concern which is in a situation whereby it can make mistakes from time to time without causing an immediate parliamentary crisis or furore, or great criticism or embarrassment for the Minister.
>
> ... if we have a public corporation, in order to get the advantages of commercial management and in order to free it from other meticulous parliamentary and political control, the House must take it that, in those circumstances, the details of parliamentary questions and the details of ministerial management, supervision and control have to be foregone. (Debates, 25 October 1950)

**574.** Rarely will matters of organization or internal management come within the ambit of the direction now being considered. They fall under subsection (2) of the section:

> **87.** (2) The auditor shall from time to time make to the corporation or to the appropriate Minister such other reports as he may deem necessary or as the appropriate Minister may require.

**575.** When compared with powers exercisable by a corporation created by special Act, a letters patent corporation may enjoy some exceptional rights. It is a question of law and public policy to what extent such a corporation may employ the "incidental and ancillary" powers listed in section 14 of the Companies Act. Because these companies were created to facilitate departmental administration, the audit concern is in the implications from the viewpoint of public policy—section 14 grants powers not enjoyed by departments. That is why, when it is felt that attention should be drawn to some act done by relying on a power set out in section 14, the observation will be treated as one falling within the ambit of section 70 of the FA Act, rather than of section 87 of the Act.

**576.** Like reporting action is applicable whenever a letters patent corporation gives effect to a ministerial or Treasury Board direction where the instruction, by statute, should have been evidenced by an order in council. The Office reasoning is that the flaw being in the Executive process, there is no reason why the corporation should be made a party to the error.

## The Corporate Administrative Process

**577.** The use of corporate bodies for purposes of public administration is no recent innovation. Hodgetts points out (p. 190) in his *Pioneer Public Service* that the short-lived Province of Canada Board of Works created in 1841 was a corporate body because it was hoped that thereby the construction of public works might be taken out of politics. During the 1940s quite a number of Crown corporations were created by relying on the War Measures Act, but normal practice is first to secure specific legislative permission.

**578. Corporations for Administrative Purposes.**—In a few statutes there is a delegation of power to create corporate bodies to facilitate administration. An example is section 7 of the Department of Defence Production Act, c. 62, R.S., which reads:

> **7.** (1) The Minister may, if he considers that the carrying out of the purposes or provisions of this Act is likely to be facilitated thereby, with the approval of the Governor in Council procure the incorporation of any one or more corporations for the purpose of undertaking or carrying out any acts or things that the Minister is authorized to undertake or carry out under this Act.
>
> (2) For the purposes of this section, upon the request of the Minister, the Secretary of State of Canada may, by letters patent under his seal of office, grant a charter under Part I of the Companies Act constituting such persons as are named by the Minister and any others who may thereafter be appointed by the Minister in their stead or in addition thereto a corporation for any purpose mentioned in subsection (1).



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(3) The Minister may remove any members, directors or officers of a corporation incorporated under this section at any time and may appoint others in their stead or may appoint additional persons as members.

(4) A corporation incorporated under this section is for all purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.

(5) Actions, suits or proceedings in respect of any right or obligation, acquired or incurred by a corporation incorporated under this section on behalf of Her Majesty whether in its name or in the name of Her Majesty may be brought or taken by or against the corporation in the name of the corporation in any court that would have jurisdiction if the corporation were not an agent of Her Majesty.

(6) The accounts of a corporation incorporated under this section shall be audited by the Auditor General of Canada.

**579.** The Office regards subsection (4) as of significance in the juridical sense but without influence in balance sheet treatment of, for example, the corporate assets. It does, of course, indicate that the appropriate Minister enjoys a power to give administrative directions and, in turn, is answerable to Parliament for corporate transactions, but in this regard subsection (1) is of more importance.

**580.** Subsection (5) is comparable in purpose with a series of amendments made in Crown corporation statutes in 1950 when the Minister of Justice explained the aim of the amendments by saying:

> We submit the present bill to make the provision uniform for all corporations carrying on commercial business that Crown corporations should be suable in the courts without a fiat. (Debates, 21 June 1950, p. 3927)

The words "or in the name of Her Majesty" in subsection (5) were added when the Bill was in committee, the Minister explaining that the addition was being made in order to make certain that contracts signed in the name of the Queen, such as Central Mortgage and Housing Corporation sometimes negotiated, would unquestionably be within the ambit of the enactment.

**581.** *Special Cases.*—The National Harbours Board Act declares the Board to be "under the direction of the Minister". Presumably this stems from an observation of the Supreme Court of Canada that administration of a seaboard harbour was not only a public service in the broad sense but also, in the strict sense, a service of government (*Halifax v. Halifax Harbour Commissioners*). Therefore, the Minister of Transport has a responsibility for decisions of policy nature, but in the audit it need not be regarded that his obligation extends to administrative application.

**582.** The Central Mortgage and Housing Corporation Act, c. 46, R.S., is unusual in that section 3 declares the Corporation to consist of:

> the Minister and those persons who from time to time comprise the Board of Directors.

Moreover, section 6 requires that three of the directors be members of the "public service of Canada". The reference to the Minister and the qualifying test for three directors would appear to place a greater responsibility on the Executive than is generally the case. This observation may also be associated with the Export Credits Insurance Corporation because the Deputy Minister of Trade and Commerce and the Deputy Minister of Finance are named members by the Act, c. 105, R.S.

**583. Non-Salaried Boards.**—The aim of Parliament sometimes is to make a group of persons wholly answerable for the application given to a statute, but generally a distinction is to be drawn between policy and administrative decisions. It is Audit Office practice to assume that a Minister has a responsibility for administration whenever the appointed members serve without monetary reward and that he should be informed whenever a matter appears to merit his consideration.

**584.** Auditors will also draw a distinction between responsibilities of a non-salaried board and its salaried staff—including any member of the board in receipt of salary. Dimock, when reviewing the situation in the British Broadcasting Corporation, puts it this way:

> The general responsibility of the Board of Governors is primarily over policy and results, not over the actual carrying out of that policy. . . . Its role is to assume responsibility to Parliament and to the public for what takes place; and hence to keep a general oversight and to make suggestions. The initiative in matters of policy, program and administration comes from the officials. (*British Public Utilities*, p. 280)

**585. Prerogative and Statutory Protection.**—Officers of Crown corporations are expected to take advantage of any protective provisions known to the law. To illustrate, a British public corporation successfully contended that it could not be sued because the action had not been started within the period permissive by a statute applicable to public bodies. A degree of public criticism resulted, but the London *Economist* correctly pointed out that:

> They cannot be blamed for raising the defence; it would be the duty of any auditor to criticise a public body which did not take full advantage of a provision in the law enabling it to resist a claim against it. (1 August 1953)

**586.** More recently, an English borough's defence was that a contract was unenforceable because the corporate seal was not attached. This was criticized as being out of step with the times, but *The Law Quarterly Review* commented that while public authorities may dislike relying on technicalities:

> it is difficult for them to waive such a defence. The answer would seem to be that unless these technicalities are necessary in the public interest, it is time that they should be abolished. (January 1957, p. 6)

**587.** A reason for strict adherence to legal rights was once given in a case involving the Canadian Government:

> It is the duty of those who represent the Crown to place the privileges of the Crown very definitely before the Courts, and if the claim in the present case had been allowed to pass without the protest being made on behalf of the Crown, the case would undoubtedly have been quoted, and perhaps acted upon, in circumstances where it would not have been so appropriate to give a reward as in this instance. (*"The Scotia"*)

**588. Contracts.**—Subject to the provisions of any statute applicable and, in the case of "agency" corporations, regulations made under the authority of section 83 of the FA Act, a Crown corporation's contracts are regulated by the law and practices applicable to commercial companies. A greater degree of formal concurrence is expected in the case of a corporation performing administrative functions than where activities are commercial in character. Of course, no Crown

corporation may contract for a purpose beyond its statutory powers nor without observing limitations (concurrence of the Governor in Council, for example) imposed by pertinent legislation.

**589. Availability of Funds.**—The 1954-55 Public Accounts Committee in Australia considered the legality of contracts of a corporation where the total exceeded its financial resources (provided by Parliament). The statute applicable was silent on the point, but did stipulate that the corporation secure the consent of a Minister to every contract involving over £50,000. The Committee decided that parliamentary interest was wholly with respect to the latter; in other words, he who contracts with the corporation takes the risk of it being unable to pay its debts.

**590.** The situation in Canada is somewhat different, particularly with respect to agency corporations, because it is to be borne in mind that section 83 of the FA Act provides that:

> **83.** The Governor in Council may make regulations with respect to the conditions upon which an agency corporation may undertake contractual commitments.

Any made are binding on Managements unless inconsistent with the provisions of some other statute. Moreover, where the pertinent statute provides that the appropriate Minister may give instructions or directions, files should be checked to ascertain whether he was consulted. The auditor will also form an opinion whether the commitment is in harmony with the budget submitted and authorized in accordance with section 80 of the FA Act. The outcome of these reviews will normally establish whether the Auditor General has a duty to report in accordance with the provisions of section 88 of the FA Act:

> **88.** In any case where the auditor is of the opinion that any matter in respect of a corporation should be brought to the attention of the Governor in Council, the Treasury Board or the Minister of Finance, such report shall be made forthwith through the appropriate Minister.

**591.** Should such a report be made, subsequent Executive action will influence decision so far as the report to Parliament is of concern. The Office view is that it is to be expected that Parliament will take a greater interest in contracts of a corporation dependent on appropriations than in cases where, normally, the corporation is self-supporting.

**592. Bank Accounts.**—Some special Acts give directions with respect to banking arrangements. If so, they take precedence over provisions of section 81 (1) of the FA Act which reads:

> **81.** (1) A corporation may, with the approval of the Minister of Finance, maintain in its own name one or more accounts in the Bank of Canada or in such bank in Canada or financial institution outside of Canada as the Minister of Finance may approve.

The Department of Finance has ruled that the word "bank" means one holding a charter as a banking institution from the Parliament of Canada.

**593.** *History of the Direction.*—As far back as the 1850s a statutory requirement was that the Governor in Council name the banking institutions in which

public moneys were to be deposited. The reason was that banks were then quite small and instances had occurred where public deposits were made to bolster the financial position of a bank rather than to serve a public need. One pre-Confederation Minister of Finance was required to resign because of such a deposit, and once a Province of Canada Government was defeated in a vote of confidence founded on a banking arrangement. After Confederation the practice continued of the Governor in Council designating banks but the 1886 Statute Revision Commission, for some reason now unknown, substituted the Minister of Finance. The foregoing is given to point out that section 81 of the FA Act is not to be regarded as a means adopted to subordinate corporate managements to the Department of Finance but rather to continue a long-established practice with respect to banking arrangements. However, the section does necessitate that a step in the audit be to make certain that depositories were approved by the Minister of Finance.

**594. Temporary Investments.**—Assuming a corporation has funds in excess of immediate requirements, the excess may be employed to earn income. A failure so to do would justify an audit note (under section 70 of the FA Act) should the sum be substantial and the inactive period prolonged. As a rule, a decision to invest is one of Management, with investments in securities of or guaranteed by the Government of Canada. The Public Accounts Committee has never ruled on the subject, but the comparable British committee has expressed the opinion that avoidance of the risk of impairment of capital is of greater significance than the rate of interest return, because a public body:

> in the absence of an express direction from Parliament for its investment, would be liable to be called to account if any investment were made that resulted in a diminution of the principal of the fund.

For that reason, it is desirable that purchases be avoided either at a premium or in securities redeemable in foreign currency whenever the amount may be required on short notice for corporate purposes. Of course, it is always within the discretion of Management to transfer moneys from a current to a savings account in an approved bank.

**595.** The fact that a corporation has such investments does not bar ministerial action made permissive by section 81 (2) of the FA Act:

> **81.** (2) The Minister of Finance may, with the concurrence of the appropriate Minister, direct a corporation to pay all or any part of the money of the corporation to the Receiver General to be placed to the credit of a special account in the Consolidated Revenue Fund in the name of the corporation, and the Minister of Finance may pay out, for the purposes of the corporation, or repay to the corporation, all or any part of the money in the special account.

The words "may pay out" need not be regarded as leaving to the discretion of the Minister whether the money will ever be returned. The purpose of the "may" is to permit the Minister of Finance, without further parliamentary action, to repay the corporation out of Consolidated Revenue Fund. The amount is only on deposit with the Minister; it continues to be corporate money and is to be included in the balance sheet, preferably as a separate item following the cash item.

**596. Borrowings.**—Unless a statute authorizes a Crown corporation to borrow from the public, a presumption is that it has no power to borrow on long-term basis. No binding opinion is of record whether a corporation may arrange short-term bank loans or overdrafts. In the 1939 reports of the British Public Accounts Committee it was noted that the practice of the Public Works Loan Commissioners (a body enjoying a borrowing power) was to rely on bank overdrafts in operating some farms held by the Commissioners. The legal view was that this mode of financing was permissive but the Committee decided that consideration should be given to substituting "some formal instrument of borrowing" in any case "where the overdraft is considerable and likely to continue".

**597.** Section 82 of the FA Act provides a scheme under which the Minister of Finance may advance up to $500,000 for a period not exceeding twelve months. This is the only source of temporary funds available to a Crown corporation wholly dependent on parliamentary appropriations. However, Parliament has not specifically imposed limits on the use that a letters patent corporation with substantial operating income may make of provisions in the Companies Act—section 14 permits any letters patent company to issue promissory notes, etc. Moreover, it can happen that $500,000 will not suffice for the needs of a commercial Crown corporation. The question is one of law, and until there is an authoritative ruling on the subject the Office view is that attention need be drawn only when: (*a*) the loan may be repaid only with the aid of an appropriation or (*b*) it has been outstanding for more than twelve months. A loan or overdraft settled within the accounting period under review is not of audit concern unless there be some special circumstance in relation thereto.

**598. Financing Governmental Services.**—Crown corporations sometimes perform services for departments, with advances made from appropriations to defray the cost. The corporation may, but need not, segregate this money from corporate resources.

**599.** The corporation in its capacity as an agent of a department is subject to the same restrictions as may be applicable to the department; for example, calling for tenders, or making an accounting as at 31 March. In turn, the corporation is entitled to claim all the privileges and rights that the Crown may enjoy.

**600.** *Parliamentary Grants to Corporations.*—Where the form is that of a grant it is assumed that, when paid over (some Minister is answerable for the regularity of that), the money ceases directly to be under the control of the Executive and may be applied by the corporation in like manner as other corporate funds, subject, of course, to any limitations associated with the payment either by Parliament or the Executive.

**601.** When money is received from the Receiver General for a special purpose, it is of importance that any balance remaining at the corporate year-end be properly classified. It should be recorded as a liability whenever the Crown may still give directions as to application. To illustrate: In the 1890s, education in Newfoundland was regulated by public statutes but the schools were owned

and operated by church authorities in return for Government assistance. Practice was to make lump sum internal transfers from the Government's bank account to those of the churches in the same bank. Money was annually appropriated but legislation did not require year-end refunds of unspent balances; however, it did require that appropriations for higher education be disbursed subject to regulations of the Governor in Council. In short, no refund might be demanded but an accounting could be of grants made for higher education. The bank failed and a question was whether balances at credit in the churches' bank accounts qualified for the Crown's priority in the distribution of the bank's assets. It was decided that this status was enjoyed only with respect to the portion held for costs of higher education. (*Fox v. Newfoundland*)

**602.** *When Corporate Moneys Used*—Converse situations may also present themselves where a corporation uses its resources to finance the cost of a departmental service. Assuming the activity is one within the category permissive to the corporation and costs incurred are recouped, no audit notice need be taken—the situation is akin to that existing when one department performs services for another. There is, however, an audit duty to ascertain that an appropriation was available to recoup the corporation whenever the outlay is recorded as an account receivable in the balance sheet. If there is not, the corporate device has been employed to by-pass the requirement that the Crown may spend only after Parliament has made a grant for the purpose.

**603.** From the practical point of view, the Executive is the offender because the role of corporate Management almost invariably has been, in fact if not in law, that of a subordinate. Therefore, unless the action of the corporation was clearly in excess of its powers, the audit observation will be in the Report to the House of Commons on the Accounts of Canada required by section 70 of the FA Act. However, should the delay in recouping the corporation extend into a second year and the amount be of significance, consideration will be given to qualifying the balance sheet certificate because of the existence of an unusual account receivable.

**604. Profits and Losses.**—At one time it was regarded that a corporation providing a public service should not demand more than cost. The reasoning was that making a profit was akin to levying a tax, something Parliament alone may do. Now various Crown corporations are subject to the Income Tax Act. There continues, however, a duty on the Auditor General to take notice of inordinate profits or losses, especially when a department of Government was the customer.

**605.** Ordinarily, it is not an audit obligation to form an opinion with respect to the efficiency of corporate Management. If the year ends with a loss, that automatically is disclosed by the financial statements. But where it is not obligatory to perform services for the benefit of individuals there is an audit duty to take notice of any charges so low that, in fact, someone was subsidized. Likewise, if a charge to a department was unreasonably below cost, parliamentary grants were irregularly supplemented.



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**606. Grants to Municipalities in Lieu of Taxes.**—Where real estate administered by a Crown corporation is property of the Crown it is not liable to municipal taxes. The Municipal Grants Act, c. 182, R.S., does not apply to:

real property under the control, management or administration of the National Railways as defined in the Canadian National-Canadian Pacific Act, or a corporation, company, commission, board or agency established to perform a function or duty on behalf of the Government of Canada.

However, some statutes creating Crown corporations grant authority to make payments to municipalities and more than once it has been stated in the House of Commons that Crown corporations have been informed, as a decision of general public policy, that it is permissive to agree to make payments in lieu of taxes.

**607.** The matter is now mentioned lest an auditor wonder if such a payment has *ultra vires* characteristics. It has not. Section 125 of the B.N.A. Act reads:

**125.** No lands or property belonging to Canada or any Province shall be liable to taxation.

As has already been observed in paragraph 244, this section prohibits a levy but does not bar either voluntary payments or agreements to pay. A decision delivered in Scotland is often quoted, particularly that part reading:

Under section 28 of the Harbours, Docks and Piers Clauses Act 1847, vessels in His Majesty's service are exempt from rates and dues. . . . But a Government Department, though not liable, may, subject to the provision of the money by Parliament, pay harbour rates and dues just as it pays local rates. And if it may pay them I think it may undertake to do so. (*Wick Harbour v. The Admiralty*)

**608. Grants for Charitable Purposes.**—Section 14 (*g*) of the Companies Act permits companies incorporated under that Act:

to subscribe or guarantee money for charitable or benevolent objects, or for any exhibition or for any public, general or useful object.

Section 208 of the same Act applies to corporate bodies created otherwise than by letters patent for purposes or objects to which the legislative authority of the Parliament of Canada extends. This section permits such a corporate body:

to subscribe or guarantee money for charitable or benevolent objects or for any public, general or useful object.

Section 208 was originally inserted for the protection of chartered banks, but the text is such as to embrace Crown corporations. It is therefore assumed that, under one section or the other, Crown corporations may legally make charitable subscriptions. However, a question of public policy is involved because a department of government may not be philanthropic with public funds. The rule, or convention, is that the benevolence of the Crown ought not to be extended, in the absence of legislation, to the relief or benefit of individuals where the outlay is not related to the performance of a public service. Because of the terms of the Companies Act and because various Crown corporations enjoy a special place in the life of communities, the Audit Office view is: No exception need be taken to a Crown corporation having earned income making contributions when (*a*) the sum is reasonable, (*b*) an influencing consideration is community public relations,

and (*c*) no other legislation covers the field. An audit report under section 88 of the FA Act would have to be made if the corporation were one wholly dependent on parliamentary grants, or if the grant had national rather than local significance.

**609. Audit Services to Corporations.**—An assumption of some writers on public administration is that, when an auditor general is named auditor of a public corporation, the report has enhanced parliamentary significance. Being an officer of the House, it can happen that an auditor general may delve more deeply into fields of parliamentary interest, while a practising accountant auditing a public corporation may be inclined to explore more extensively than an auditor general the commercial aspects of the corporation's affairs. But in either case audit fundamentals will be performed efficiently. The real distinction is that one is performing a duty of office while the other is rendering professional services in return for a fee. Thus, in scheduling work, the auditor general will take into calculation not only the necessities of the audit but also that Parliament expects his reviews of accounts to be so planned that corrective action, wherever necessary, may be taken before accounts of the year are closed. Consequently, he will generally allot more time for review of transactions than would be expected of a commercial auditor.

**610.** It is Audit Office policy to avoid over-emphasis of 'shareholder's interest'. A Crown corporation exists to provide some public service. Its efficiency is determined by performance rather than by profits. This, naturally, moulds the perspective and decisions of Management and, in turn, audit evaluations. It is of greater importance that Crown corporations efficiently render the services for which created than that they be in position to make contributions to Consolidated Revenue Fund.

**611.** Repeating an earlier statement, it is Audit Office policy to assist Managements in every way practicable. The word 'practicable' is used deliberately because it sometimes happens that it may be undesirable that the Office perform an extraneous service. An illustration would be assisting in the settling of income tax liability. The corporation is part of the public service, but that is not a reason why it should not demand, as a right, that the Department of National Revenue prove its liability for any amount claimed. A Crown corporation officer is never open to criticism because he contests a levy when honestly believing it is excessive; he could be were he to refrain from doing so because a Crown corporation is involved. In tax controversies it is not unusual for business firms to rely on their lawyers and auditors. However, in the case of a Crown corporation the Auditor General cannot participate. He may not allow an extra-statutory service to conflict with the statutory duty to keep under review Taxation Division practices to establish whether they are such as to

> secure an effective check on the assessment, collection and proper allocation of the revenue. (Section 67 of the FA Act)

Allowing for special circumstances such as the foregoing, a Crown corporation is to be provided with every service at the command of the Audit Office.



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**612. Cautionary Note.**—In the preparation of this chapter of the Guide, it was decided to pivot on Part VIII of the FA Act in order to avoid tiresome qualifications and exceptions. Attention is therefore drawn to section 78 (1) of the Act:

> **78.** (1) Sections 79 to 88, both inclusive, apply to agency corporations and proprietary corporations, but in the event of any inconsistency between the provisions thereof and the provisions of any other Act, the provisions of such other Act prevail.

## The Statement of Assets and Liabilities

**613. Introductory Note.**—After Lower and Upper Canada were united by the 1840 Act of Union, it was the practice to include in the Public Accounts a year-end "Statement of the Affairs of the Province of Canada". Major works, such as the deepening of canals (the original Lachine Canal dug around 1700 was eight feet wide and eighteen inches deep), were financed by borrowing specifically for the cost of a particular project, loan proceeds being credited to a special account and spent either for construction or subsequent operating charges. The statement disclosed these special accounts and also various trusts. In 1858 the Board of Audit (the 'Auditor', the Deputy Inspector General and the Commissioner of Customs) rearranged the statement and called it a "Statement of Affairs Showing the Liabilities and Assets of the Province of Canada", but readers were warned to accept some of the stated amounts with reservation because totals listed for public works included operation costs in some cases, while some works listed were no longer in existence.

**614.** At Confederation, therefore, a practice was in effect of publishing an annual statement in the form of a balance sheet and it was given statutory status during the 1868 session by it being enacted that:

> The public accounts of the Dominion shall be kept by double entry in the Offices of the Receiver General and of the Minister of Finance; and an annual statement shall be prepared as soon as possible after the termination of each fiscal year exhibiting the state of the Public Debt and the amount chargeable against each of the public works for which any part of the debt has been contracted; also the state of the Consolidated Revenue Fund and of the various Trusts and special Funds under the management of the Government of the Dominion, and such other accounts and matters as may be required to shew what the liabilities and assets of the Dominion really are at the date of such statement.

**615.** *Capitalizing of Works.*—The custom then was to capitalize those public works created by means of special borrowings. When it became the practice to borrow omnibusly, e.g., 'for public works and general purposes', classification of works for balance sheet purposes was controlled by texts of votes signifying whether outlays were to be recorded as incurred on 'capital' account or chargeable as expenditures of the year. In due course the Public Accounts Committee became interested because a budgetary surplus could result from an overly free designation of items as 'capital'. The Committee recommended that only projects having national, rather than local, significance be capitalized; but it was only in 1920 that a large sum representing public works expenditures was deleted from the statement. Since then, outlays under 'capital' votes have been written off as expenditures. The practice of inserting the word 'capital' in votes was practically discarded in 1938 when the form of the Estimates was drastically revised; therefore, when now used it is essentially for expenditure classification purposes.

**616.** *Treatment of Loans.*—The statements included various assets representing loans to railway companies and others. As early as the 1870s doubts were expressed in the House of Commons as to the real worth of some of these, but the country was optimistic about the future of railways so no action was taken prior to 1909 when the Public Accounts Committee recommended that a number of assets representing loans be removed from the balance sheet. The report of the Committee was treated as providing authority to make the change. During War I the total of such loans grew to a large sum, the Government first assisting and then taking possession of various railway systems.

**617.** *Selection of Assets.*—In 1920 the Minister of Finance informed the House of Commons that his test in classifying asset items would, in future, be:

> Assets which are not readily convertible, as the specie reserve is, or are not interest producing, are not such assets as ought to be deducted from the gross debt. They are inactive, they are items of such a character as might well be placed in a suspense account. At any rate, whatever may be their future value, however great it may be, they are not assets of such a character as to directly reduce the gross debt any more than the other capital accounts of the country ought to be deducted from it.

He gave effect by transferring upwards of $300 million of loans, etc., to a memorandum 'below-the-line' section of the statement, the balancing Net Debt figure in the statement being correspondingly increased.

**618.** His action was immediately commended by the financial critic of the Opposition:

> I was glad to hear my hon. friend the Minister of Finance frankly point out today that we cannot rely on that statement of net debt as telling the whole story. Our assets have at all times contained some items to which, on careful examination, exception may be taken; but while our assets did not bulk very largely that perhaps was not of so much importance.

The speaker had personal knowledge because he had been Minister of Finance from 1896 to 1911.

**619.** The House did not regard its formal concurrence a necessity. What was done was to transfer from 'active' to 'non-active' without specific parliamentary authorization. Subsequent transfers from 'non-active account' to Consolidated Deficit Account in the memorandum section of the statement were, however, regarded as requiring parliamentary consent although no expenditure charges were involved. The distinction between 'non-active' and 'consolidated deficit' accounts no longer exists because no memorandum section is now associated with the statement to analyse the Net Debt balancing item. A deletion by a write-off to Net Debt now requires parliamentary concurrence.

**620.** *Audit Obligations Since Confederation.*—The 1868 legislation gave no direction with respect to certifying the balance sheet. However, when the first Consolidated Revenue and Audit Act was enacted in 1878 it provided that:

> It shall be the duty of the Deputy of the Minister of Finance to prepare and submit to the Minister of Finance the Public Accounts to be annually laid before Parliament, such accounts to be countersigned by the Auditor General.

What meaning was to be given to the word "countersigned" may only be conjectured because the same Act provided that the Auditor General examine accounts other than appropriation accounts only "if required to do so by the Minister of Finance", in which event his examination was to be conducted:

in accordance with any regulations that may be prescribed for his guidance in that behalf by the Treasury Board.

In his first report the Auditor General asked (unsuccessfully) what "countersigned" was intended to mean. In 1888 the provision was repealed, the Minister of Finance explaining that countersigning "has not been done because it has not been found of any advantage".

**621.** The Balance Sheet was never certified until 1920, but in the ensuing ten years it was, in one form or another, on six occasions:

*1920 and 1921:* The Minister retained a firm of commercial accountants to assist in the revision of the assets and to certify the new statement. The material part of the certificate read: "We certify that the above-mentioned statements accurately set forth the matters therein referred to, and are as shown by the said books".

*1924:* Two accounting firms jointly reviewed the statement to give the following certificate: "We certify that the Balance Sheet conforms to the Balance Sheets of previous years in not including in the Net Debt of the Dominion, issues of the Canadian National Railway Company and Companies included in its System, which carry the guarantee of the Dominion of Canada. Such Guaranteed Issues are shown year by year as Indirect Liabilities".

*1927:* A different accounting firm was retained for the same purpose as in 1924 and gave a comparable certificate but added: "The Net Debt of the Dominion at the 31st March 1927 has been substantially verified by the Board of Audit in conjunction with us".

*1929 and 1930:* The same firm made a general audit, the certificate reading: "We certify that in our opinion the said Balance Sheet, with accompanying Schedules (A to T and V), is properly drawn up so as to exhibit a true and correct view of the financial position of the Dominion of Canada at March 31, 1929, according to the information and explanations received by us and as shown by the Books of Account of the Dominion".

**622.** When the Bill leading to the Consolidated Revenue and Audit Act, 1931, was before the House of Commons, the Minister of Finance stated that, in future, the Auditor General would audit the accounts of the Department of Finance and certify the balance sheet. Commencing in 1933, the Auditor General included in the body of his general report to the House of Commons a certificate reading:

In my opinion and subject to the observations which follow and comments in various sections of this report, and according to the best of my information and the explanations received, the above mentioned statements exhibit correctly the transactions of the year, and the Balance Sheet indicates the financial position of the Dominion as at March 31, 19....., as shown by the books and records.

Since 1943, practice has been to imprint the audit certificate on the statement published in the Public Accounts.

**623.** Because of its legislative and administrative history, the statement (now called "Statement of Assets and Liabilities") was initially and still is somewhat of a hodgepodge, being neither an all-embracing conventional balance sheet nor an analysis of the factual financial position as of any given date. This stems from long custom, demands of double entry accounting, the limitations imposed

by governmental 'cash' accounting, etc. A presumption is that it will so continue until Parliament defines the meaning to be given the phrase "financial position of Canada as at the termination of the fiscal year". This is not offered as criticism of the statement prepared annually with great care by the Department of Finance, but rather to point out that the audit obligation is to establish whether: (*a*) the Net Debt amount is computed in a manner that permits fair comparison with the amount of other years, and (*b*) the compilation treats with all pertinent open accounts of departments. It is an audit in which all divisions of the Audit Office play a role.

## Requirements of the FA Act

**624.** The FA Act received assent in December 1951 and became operative in April 1952. Like its predecessors, it requires that a statement of assets and liabilities be annually included in the Public Accounts and this statement certified by the Auditor General "in accordance with the outcome of his examinations". The 1868 direction, as already noted, required that the statement show

> what the liabilities and assets of the Dominion really are at the date of such statement.

This direction continued until 1952, although the 1931 legislation dropped the word "really". The present legislation directs disclosure

> of such of the assets and liabilities of Canada as in the opinion of the Minister are required to show the financial position of Canada as at the termination of the fiscal year.

**625. The Bookkeeping.**—Accounting directions with respect to the assets and liabilities are set out in section 63 of the FA Act, the material part reading:

> **63.** (2) Subject to regulations of the Treasury Board, the Minister
>
> (*a*) shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada, and
>
> (*b*) may establish such reserves with respect to the assets and liabilities,
>
> as in his opinion are required to give a true and fair view of the financial position of Canada.

**626.** It will be noted that the Minister is now to "cause" accounts to be kept; in the previous statute it was required that the books be kept "in the office of the Minister". This change provides elbow room. It would seem that the Act contemplates that officers of the Department of Finance (this includes the Treasury) are to maintain the central or control accounts but working records may be kept by others. For example, when section 20 of the Bank of Canada Act, c. 13, R.S., is read together with the accounting directions in the FA Act (including section 48), operating accounts relating to the Public Debt may be those kept by the Bank of Canada.

**627.** The Minister not enjoying authority over staff of other departments (*see* paragraph 53), the words "subject to regulations of the Treasury Board" at the start of section 63 (2) presumably are intended to permit, to the extent

necessary, the Minister to give and enforce accounting directions to other departments keeping accounts relating to assets and liabilities. All accounts maintained by the Comptroller of the Treasury are, of course, already within the control of the Minister of Finance because the Comptroller is appointed "as an officer of the Department of Finance" (section 11 of FA Act).

**628.** *The Minister's Statutory Obligation.*—In this audit it is ever to be borne in mind that the Minister of Finance has a dual official personality. By nature of his office, he is an officer of the Crown, but section 9 of the FA Act vests in him "the management of the Consolidated Revenue Fund" and in this connection he acts on behalf of Parliament. Sections 9 and 63 will be read together. In presenting the Statement of Assets and Liabilities, the Minister of Finance reports as the agent of Parliament entrusted by statute with the management of Consolidated Revenue Fund (*see* paragraph 203 for an illustration). In presenting the statement the Minister is not, strictly regarded, making an accounting of a stewardship, rather it is a statutory appraisal of the financial position; but it is debatable whether Parliament contemplated, when enacting the FA Act, that it be the current or long-range position.

**629.** Until the Act of Union the Governor of Canada was financially independent of the Assemblies; now, all moneys received are Revenue at the disposal of Parliament. The Crown may contract without benefit of legislation but it cannot create a charge on Consolidated Revenue Fund without Parliament's consent. Conversely, assets not in the form of money or the equivalent are outside the Fund. For example, only when undeveloped Crown lands are being sold, or in some other manner become a direct source of revenue, is it appropriate to regard them as a Consolidated Revenue Fund asset. In this regard, Canadian practice is comparable to that of the United States where:

> Assets not held for use and acquired at no cost—such as the public domain and land donated as a historical site—are not accounted for on a dollar basis where reasonable values cannot be ascertained. (*Accounting in the Federal Government,* by Kohler and Wright, p. 234)

**630.** The Crown is the representative creditor when, for example, a loan is made out of Consolidated Revenue Fund, but when the money is repaid proceeds automatically go to the credit of the Fund, which is under the control of Parliament on behalf of the people of Canada. Parliament permits the Crown to use the resources of Consolidated Revenue Fund but the Crown never possesses a dollar of public money. Consequently, in performing this audit it is never to be assumed that the Crown is the debtor or the creditor. It is the debits and credits of the Fund that are under examination. The true asset item is specie or the equivalent, plus potential recoveries of moneys loaned or advanced out of the Fund. In turn, the true liabilities items are those obligations created by legislation with respect to which the Crown enjoys no discretion and which are payable without further appropriation upon becoming due.

**631. The Form of the Statement.**—The purpose of the statement being to inform rather than to regulate, the Audit Office supports any practice that should

result in a presentation that portrays the broad aspects and avoids the unimportant. Smails was considering a corporate balance sheet, but the following observation has pertinence:

> The published balance sheet must, as a minimum, give the amount of detail stipulated by the governing Act; as a maximum it could give all the detail contained in the ledgers of the company. It is generally agreed on the one hand that bare, formal compliance with the statute is not enough; on the other hand that no useful purpose is served by giving shareholders a mass of detail which is essential for purposes of control and efficient management, but quite irrelevant for purposes of balance sheet analysis. (*Accounting Principles and Practice,* 6th ed., p. 427)

The liabilities side of the statement currently approximates $18,000 million, which is a sum beyond human comprehension, therefore the accounting doctrine of materiality (relative importance) may be regarded by auditors as applicable.

**632.** A use of the statement is to make comparisons with other years, therefore it is desirable that headings, scheduling, etc., be in a form consistent with past usage. However, auditors will bear in mind the accounting convention:

> Consistency must not become a fetish, it must allow for necessary improvements in technique and changed conditions. (*Advanced Accounting* by Yorston, Smyth and Brown, Vol. 1, p. 11)

Numerous headings can be distracting, therefore, when consulted, auditors should encourage headings by categories, with particulars relegated to the schedules. It is a matter of opinion whether it is helpful to readers to associate names of departments with scheduled items. That is not required by law and section 9 of the FA Act makes the Minister of Finance answerable for all items listed in the statement. Moreover, Campbell correctly points out that departments

> are merely organization units delineating the functions and responsibilities of individual Ministers. (*Australian State Public Finance,* p. 16)

A department being never creditor or debtor, Audit Office preference is to omit names of departments and to compile schedule listings in order of monetary significance with minor items consolidated at the end.

**633.** *The Phrase "True and Fair View".*—Section 64 of the Act does not require that the Auditor General express an opinion whether the statement gives a "true and fair view" of the financial position of Canada. However, the phrase appears in section 63, which treats with the records to be kept for the purposes of the statement. Therefore, it is assumed that an audit obligation is to take notice of the phrase, concisely defined by Bateman:

> For the accounts to show a 'true' view they should be in accordance with the facts, and to show a 'fair' view they should be presented in such a form as may be considered as reasonable having regard to the circumstances. (*Company Accounting,* p. 44)

The phrase "true and fair view" first appeared in the 1948 British Companies Act, so a resulting observation in Dicksee's *Auditing* is quoted:

> It is interesting to contrast the phrase 'true and fair view' with the phrase 'true and correct view' which occurred in section 134 of the Companies Act, 1929, in relation to the auditor's report. In this respect the Companies Act, 1948, appears to be less stringent than

the Act of 1929. It is suggested that the word 'correct' is too rigid, conveying as it does the implication that one set of figures alone is correct, and that any conceivable alternative is therefore incorrect. It is hardly necessary to remind the reader that the element of estimate must enter very largely into many figures in both profit and loss account and balance sheet, and that in many cases estimates somewhat different from those actually adopted may be equally legitimate. The employment of the word 'fair' overcomes this objection, and opens the door to a reasonable flexibility. (17th ed., p. 185)

**634.** The problem more frequently presents itself in connection with investments in Crown corporations, because section 87 of the FA Act requires the Auditor General to certify, with respect to those he audits, whether in his view the balance sheet of the corporation gives a true and fair view of its financial position. Therefore, the Office is already on record when it reviews and certifies the Minister's statement. Where balances do not correspond, what is the appropriate audit action? The corporations are public-owned; many have done well financially and have a current worth greater than the amount represented by advances from Consolidated Revenue Fund. Adjustments of the investment items, however, are rarely made in the Minister's accounts to reflect accumulated surpluses; conversely, there have been instances where the liability to the Crown has been written off without the action being reflected in the corporation's accounts. There are, therefore, alternatives that are equally supportable. On the other hand, when different values are given to the same thing in different sections of the Public Accounts, it may be confusing to readers and, perhaps, disturb confidence in the Public Accounts as a whole. Consequently, Audit Office preference would be to include in the Minister's statement amounts that correspond with those in corporate statements. At the same time, it is recognized that the Minister of Finance may prudently take into calculation that book values may not represent realizable worth; therefore, it would not be regarded in the audit as inappropriate were he to use corporate amounts and simultaneously provide reserves in the Statement of Assets and Liabilities.

**635. Temporary Investments.**—Where these are in the form of securities of or guaranteed by Canada, it is to be expected that they be valued at cost for statement purposes unless some alternative is permissive by statute. An example of an exception is an investment under the authority of section 17 of the FA Act because these are to be valued at amortized cost. Another exception is with respect to temporary investments for the Unemployment Insurance Fund where section 82 of the Unemployment Insurance Act, c. 273, R.S., permits the securities to be pledged as security for temporary advances from the Bank of Canada or from Consolidated Revenue Fund, but the advances may not be in excess of "par value". Therefore, neither cost nor current market worth would need to be taken into calculation were the Commission to seek a temporary advance from Consolidated Revenue Fund.

**636.** It is to be expected that temporary investments payable in foreign currencies be listed at cost with this converted into Canadian dollars on the basis of the official rate of exchange on 31 March. Cash balances in foreign currencies

should also be converted into dollars by use of the same exchange rates. Where these balances are not freely convertible, the appropriate practice is to value at official rates of exchange.

**637. Assets Not Included.**—The statement is to consist of "such" of the assets as the Minister of Finance is of opinion are required to give the financial position. The Minister enjoying a statutory discretion, the audit is of those listed; however, to the extent that the "true and fair view" phrase influences the audit certificate, any significant omission can be of parliamentary interest, therefore auditors should note any omitted asset item that should be made the subject of a query to the Department of Finance.

**638.** While in 1920 the Minister of Finance decided that the test of convertibility or income return should determine whether or not an asset be listed, it is to be borne in mind that no Minister of Finance may bind his successors in the exercise of this statutory discretion.

**639. Liabilities.**—It is to be expected that the statement will disclose in adequate manner all significant direct liabilities resulting from authorizations by Parliament to pay out of Consolidated Revenue Fund. But not everything that is to be paid in due course is necessarily a liabilities item for the purposes of the statement; it should be a liability of the Crown recognized and accepted by Parliament as of 31 March. It is not to be stretched to include something which is morally certain but which in law does not become a liability until a subsequent date. The tests are: (*a*) on 31 March was authority existing to charge Consolidated Revenue Fund or (*b*) had the services been provided? Should the answer to either be in the negative, the item is not a true liability for statement purposes.

**640.** *Unmatured Public Debt.*—Section 63 (3) of the FA Act requires that the accounts be kept in the currency of Canada. Because of the rate of exchange prevailing on 31 March, auditors may sometimes have to consider what is the true liability re long term loans repayable in U.S. currency. The Office view is: No cash outlay is immediately pending; use of other than par of exchange would involve fresh calculations annually and, based on past experience, could distort comparisons of Net Debt as well as causing significant variations in Premium, Discount and Exchange account. Further, no one can forecast what the exchange rate may be when the issue matures. Moreover, there is always the possibility that the loan may be refinanced in the United States, in which event no exchange operation will occur. Because of considerations such as the foregoing, the Audit Office accepts the practice of using par of exchange until year of maturity.

**641.** *Outstanding Matured Securities.*—Although some date from Confederation, practice is to list, as current liabilities, all matured securities and interest coupons which have not been presented for redemption. The good name of

Canada being pledged, the situation would indeed be extraordinary were the Minister of Finance to refuse payment on presentation, therefore no audit thought need be given to the relevance of statutes of limitations. However, an auditor may become concerned about the practice of listing those that matured many years ago, because they are now a liability in name rather than in fact. The decision is with the Minister of Finance, but the Office view is that no notice would necessarily be taken were he to omit those that matured, let us say, twenty or more years ago.

**642. Special Accounts.**—It is a moot question whether some statutory special accounts now listed among the liabilities are within the ambit of the requirements of section 64 of the FA Act. Where the purpose of a special account is simply to make an accounting segregation of income and outgo in order "to keep track of the financial fortunes" of a statutory service, it would seem that no debtor-creditor relationship is established (*North-Eastern Gas Board v. Leeds*). Further, where no person may demand an accounting as a right, it is difficult to regard any statutory special account as a trust because it is the credit of the State that is the real security. Moreover, the word 'liabilities' implies a binding obligation to pay—something non-existing with respect to those accounts where the balance at credit represents an amount that the Crown may spend but is under no compulsion so to do.

**643.** Section 64 of the FA Act vesting a selection discretion in the Minister, the reason for inclusion is not something that need be explored in the audit. The Office view, of course, is that where a contractual relationship exists in one form or other, for example a Government Annuity contract made under the authority of the Government Annuities Act, it is obligatory to list; but where the special account exists for convenience in administration, the Minister may omit. To illustrate Office evaluations, two statutory special accounts are contrasted.

*Railway Grade Crossing Fund.*—This special account, established by section 265 of the Railway Act, c. 234, R.S., is credited with parliamentary grants to be expended in the discretion of the Board of Transport Commissioners. While it is a memorandum account of non-lapsing parliamentary grants, the Board is wholly independent of the Crown when it authorizes charges to the account. Therefore, it seems to follow that the Minister of Finance holds as a depository and that the balance at credit is a liabilities item for statement purposes.

*National Capital Fund.*—This special account was created by an item in the 1948 Main Appropriation Act. It also is a memorandum account of non-lapsing parliamentary grants, but is distinguishable from the Railway Grade Crossing Fund in that no charge may be made to it without the consent of the Governor in Council. Because of this, the Office view is that no true liability exists for statement purposes.

**644.** *Actuarial Reports on Special Accounts.*—Normally, any direction in an Act calling for a periodic report by an actuary on the state of a special account has as its purpose that of providing information to Parliament. Unless the

statute directs, accounting notice should not be taken of the report in anticipation of parliamentary action. The Public Service Superannuation Act is used to illustrate because it contains legislative contrasts. First, it directs that:

> There shall be credited to the Superannuation Account, as soon as possible following the authorization of any salary increase of general application to the Public Service, such amount as, in the opinion of the Minister, is necessary to provide for the increase in the cost to Her Majesty in right of Canada of the benefits payable under this Act, as a result of such salary increase.

This is an appropriation to the Superannuation Account, with the precise amount to be settled by the Minister after taking expert advice. The audit interest is in whether (*a*) the amount was computed in an appropriate manner and (*b*) the Account did not suffer an interest loss because of any unreasonably long delay in crediting the amount. The Act also directs that the Minister lay before Parliament at not more than five-year intervals

> an actuarial report on the state of the Superannuation Account, containing an estimate of the extent to which the assets of the said Account are sufficient to meet the cost of the benefits payable under this Act.

The purpose of this report is solely to inform. Should it point to a need for additional resources, legislative action could take different forms; for example, an appropriation might be made, or contribution rates might be increased or the scale of benefits might be modified, etc. However, what is of concern is that, until there is a legislative direction, the Minister of Finance lacks power to take any accounting action.

**645.** *Crediting Interest to Special Accounts.*—It has repeatedly been held that a liability to pay interest exists only when established by statute or contract. Therefore, no automatic entitlement to interest is to be presumed to exist when some statute creates a special account. Nor may it be assumed in the audit that it is permissive to convert an authorization to pay a sum out of Consolidated Revenue Fund into a power to establish a special account in the Fund and allow interest thereon by relying on section 20 of the FA Act. In such circumstances, the view would necessarily be that no money had been "received" within the intent of the section. Moreover, it would be regarded that it was a mere subterfuge were the money technically paid out and then returned by the recipient. In the absence of legislation, there is no liability to pay interest on money held for the convenience or profit of a public body or private person. An extra-statutory exception is when a non-statutory charitable purpose is involved.

**646.** Where a statute directs interest to be credited from unappropriated moneys, no discretionary power exists to make temporary investments in securities. However, when the role of the Receiver General is simply that of a depository, or legislation tolerates investments, a presumption is that any made are to be in securities of or guaranteed by Canada, with earnings to be credited to the special account.

**647.** Many years ago the British Public Accounts Committee became concerned over the fact that a public board had £86,000 lying idle and that this situation might persist for some time. The Committee requested a report from the Treasury and in due course the Committee was advised:

> There does not appear to be any legal obstacle to the investment of the balance of the Fund. But an Office or Department entrusted with the charge of a public fund of this nature, in the absence of an express direction from Parliament for its investment, would be liable to be called to account if any investment were made which resulted in a diminution of the principal of the Fund.

The decision taken was that investing was permissive in Government securities purchased at or below par and due to mature before the money might reasonably be anticipated to be required for the purpose for which held. When such an investment is made, appropriate accounting treatment is to disclose on the liabilities side of the statement the full balance at credit of the special account and offset on the assets side by an amount represented by the investment in securities.

**648. Reserves.**—Section 63 of the FA Act permits the Minister of Finance to establish "such reserves" in connection with the assets and liabilities he lists in the statement as, in his opinion, are required to give a "true and fair view" of the financial position of Canada. Of course, reserves are not to be established capriciously.

**649. Suspense Accounts.**—These are to be found on each side of the statement. In the audit a comprehensive review is to be made of each of these because, as Paton remarks:

> Suspense accounts should be resorted to only where there is genuine need for such a record and at the close of the regular period, if not sooner, it is highly desirable that all such accounts be closed. To use continuing suspense accounts for the purpose of carrying doubtful asset balances or to avoid making decisions as to the character of particular items is decidedly bad practice. (*Essentials of Accounting,* p. 184)

Because of its nature, it is accepted that the use of suspense accounts cannot wholly be avoided in the statement under review, but the word 'suspense' contemplates clearance shortly, with delay due to a doubt existing as to the appropriate classification. Special attention is to be directed in the audit to the possibility that among the items so listed there are some recording outlays of money but so grouped because the outlay cannot qualify as a legal charge to a vote. A degree of tolerance is permissive but audit notice must be taken where an item is not cleared out of a suspense account within a reasonable time.

**650. Contingent Liabilities.**—Sections 63 and 64 of the FA Act distinguish between "direct" and "contingent" liabilities, with an audit certificate required only with respect to the direct. The Act does not provide a definition of "contingent liability" but one by Coomber is:

> A contingent liability is a possible source of responsibility or loss which may crystallise into a definite liability in the future. (*Auditing Practice,* p. 136)

This is apt for the purposes of a corporation but is not wholly appropriate for present purposes. A government, like a company, may freely undertake to act in a certain way should a certain state of affairs eventuate. Good faith is thereby pledged, but there is this distinction between the two: the giving of the undertaking automatically commits the resources of the company, but a government's undertaking is contingent upon Parliament recognizing the commitment. In the audit, therefore, interest is in those contingent undertakings where there is an authorization by Parliament to draw on Consolidated Revenue Fund if and when the need arises. An example might be a C.N.R. bond issue that has been guaranteed as to principal and interest under the authority of a financing statute.

## Aids in Applying Statutes

**651.** The interpretation of statutes is a function of law officers, but auditors constantly have to consider texts of statutes so a few aids in establishing legislative intent are now given.

**652.** The statutory aid in construing statutes is the Interpretation Act, c. 158, R.S. However, many questions are answerable only by the application of long-established rules of law, because Parliament does not intend to alter the common law or an existing statute beyond what it expressly declares.

**653.** When seeking to establish what is permissive, auditors will take words as being used in their natural meaning and expressed grammatically, and have regard to the context in which the words are used. If these do not resolve doubts, it should be suggested that the department obtain an opinion of the law officers. An auditor should keep an open mind by avoiding his personal point of view as to what is desirable. He should be neither a 'hair-splitter' nor over-tolerant of administrative action. Often the Bill on which an Act is founded originated with the officers who administer it; therefore, the risk is present that they will tend to interpret in accord with what they planned to achieve, rather than by what the text recites. The direction in section 15 of the Interpretation Act that all statutes shall

> receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act.

relates to what may reasonably be presumed to be Parliament's intent and not what the draftsman might have been thinking. When a statute imposes a tax or places a restriction upon the public, the wording is to be narrowly construed.

**654.** When an auditor is examining a statute, he has certain words and phrases to consider. He should not presume that Parliament contemplated that a section would be susceptible to loose or inexact application, nor should he seize upon a single word or phrase and magnify its significance. The context and other parts of the statute are to be correlated to the end that there is consistency throughout.

**655.** A section of an Act often opens with the word "when" or "where". An auditor will bear in mind that this is without reference to time or place, instead the word means 'if the following circumstances exist'. The trend in drafting is to use "where" whenever frequent recurrence of the circumstances is probable.

**656.** There is also growing use of "that" to introduce a restrictive clause and the pronoun "which" to introduce a descriptive clause, but in older statutes many a "which" could be a "that".

**657.** Another drafting habit, fortunately disappearing, is the use of "such" and "said". A memorandum on drafting issued by the Department of Justice observes that:

> These words are usually unnecessary and frequently create doubts. In most cases an article or pronoun can be used with better effect. (p. 12)

When an auditor is worried over the meaning intended to be given to a "such" he may usefully consider an observation of Russell:

> The word "such" is not infrequently used in Acts when the word "the" or "that" would be more correct. In the first place, "the" or "that" is better English; and in the second place, the general use of "such" may cause confusion to arise when it is desired to use the word "such" in its correct meaning. (*Legislative Drafting and Forms,* p. 87)

Correct use of "such" is when it is followed by "as"; for example, "in such manner as".

**658.** *"Shall".*—This is the most troublesome word in the statutes. The Interpretation Act declares:

> **10.** The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning.

In other words, "shall" is not inserted to indicate the future tense. Again quoting from the Justice memorandum, the author gives illustrations of correct and incorrect drafting:

| *Incorrect* | *Correct* |
|---|---|
| if any person shall give notice . . . | if any person gives notice . . . |
| where any balance shall have been found . . . | where any balance has been found . . . |
| as the Minister shall prescribe . . . | as the Minister prescribes . . . |

**659.** The word "shall", when imperative, commands some person. If no person is mentioned, it follows that no command is given.

**660.** In turn, there is a distinction between an imperative and a directory "shall". Here, when an auditor is in doubt, he will tread softly and urge that the department obtain an opinion of the law officers. Ordinarily, when a statute requires that something be done in a certain way, for example, 'shall call for tenders by public advertisement', it would be unfair to regard a contractor as having no claim for payment because a department failed to advertise. Those responsible may have left themselves liable to censure but, if the contract was otherwise regularly authorized and carried out, payments to the contractor would not be illegal. Maxwell uses this illustration:

> To hold that an Act which required an officer to prepare and deliver to another officer a list of voters on or before a certain day, under a penalty, made a list not delivered till a later day invalid, would, in effect, put it in the power of the person charged with the duty of preparing it to disfranchise the electors, a conclusion too unreasonable for acceptance. (*Interpretation of Statutes,* p. 321)

On the other hand, if the aim and object of the legislation would be plainly defeated were something not done in a particular manner, the "shall" has imperative intent.

**661.** *Preambles.*—These are no longer freely used. The preamble may not prudently be regarded as an enactment. Coke colourfully described a preamble as a key to open the meaning of the makers of the Act and the mischiefs it was intended to remedy. Auditors may look to a preamble for guidance as to general intent, but they should found opinion on the text of sections in the Act.

**662.** *Marginal Notes.*—The Interpretation Act states that these "form no part of the Act but shall be deemed to be inserted for convenience of reference only".

**663.** *Headings.*—The precise significance of a heading is debatable, but auditors may safely treat prefatory words as intended to assist in explaining doubtful expressions in the body of a following section. Not so long ago it was said:

> Headnotes cannot control the plain meaning of the words of the enactment, though they may, in some cases, be looked upon in the light of preambles, if there is any ambiguity in the meaning of the sections on which they throw light.

**664.** *Punctuation.*—Phrases and sentences are to be construed according to rules of grammar, but punctuation marks are inserted primarily to facilitate reading rather than to convey meaning. To read with the aid of punctuation marks is a normal habit, consequently an auditor may regard them as aids to elucidate the intent of the legislation. Punctuation is a matter of individual taste, therefore when an auditor considers that the punctuation of a sentence is of importance he should not test by applying his own preferences; instead, he should examine the style or form employed throughout the Act. If he observes that the form was varied in the particular sentence, some significance may be attached to the change.

**665.** *Definitions.*—A section of many Acts sets out definitions to be applied to certain words. The intent is to include or exclude something with respect to the inclusion or exclusion of which there is a doubt without such a definition. The definition is for the purposes of a particular Act only—it does not extend to other statutes but sometimes is a helpful guide. Moreover, a statutory definition is applicable only where it is logical and is in harmony with the context, even in the Act in which it appears.

**666.** When applying a definition section, it is of importance to note whether it opens with 'includes', 'means' or 'means and includes'. When the word 'includes' is used, the intent is that the word be given its ordinary meaning and also something else which it does not ordinarily mean but which, for convenience, is declared to be included in it. When 'means' is used, the intent is *prima facie* restrictive. The legislative intent is that the definition must be applied. 'Means and includes', being a contradiction of terms, is rarely used, but in some Acts it is, in which event it may prudently be regarded as intending to be an exhaustive description for the purposes of the Act. When, in addition to a general definition section, a Part of an Act has a special definition section, the latter takes precedence for the purposes of the Part.

**667.** *Descriptions.*—A problem often is the application of words which end a descriptive definition, or a listing of persons or things in an Act. A draftsman, whenever practicable, avoids enumerating particulars, because ultimately an omission turns up. Consequently, the practice is to use a generic term to describe the field, and to end the description with some general word. For example, the British Traffic Act, 1930, defines 'traffic sign' to include:

> all signals, warning sign-posts, direction posts, signs or devices.

It was decided that the word 'devices' referred to things belonging to the species of signals, sign posts, etc., therefore a white painted line on a road was not a traffic sign. (This was an application of what is known as the *ejusdem generis* rule.) However, where general words are obviously not to be regarded as related to those enumerated—for example, 'or things of whatever description'—a different situation exists.

**668.** Another rule an auditor should heed arises where a statute describes, by rank, persons or things in descending order; any officer or thing of higher rank than the first-named is excluded. There is the ancient but accepted rule that when an Act referred to 'abbots, priors and other prelates of the Church', that did not include a bishop. Likewise, an enactment imposing duties on 'copper, brass, pewter, and tin, and on all other metals not enumerated' was declared inapplicable to precious metals such as gold and silver.

**669.** *Proviso.*—A proviso to a section is ordinarily to be regarded as having for its purpose that of creating an exception—to except out of the earlier part something which, but for the proviso, would be within it. Modern drafting practice is to avoid use of provisos.

**670.** *Negative Sentences.*—Particular attention is to be paid to sentences stated in the negative form. These convey the intent of strict compliance. A sentence affirmatively expressed may, as a rule, be given more generous application.

**671.** *Special and General Enactments.*—The rule is that special provisions in an Act take precedence over general provisions. It is application of the rule that general things do not derogate from special. This extends to treatment of statutes as a whole, as special Acts are not repealed or amended by general Acts unless there be some express reference to the previous legislation.

**672.** *Conflicts Between Provisions.*—Where there is conflict between two statutory provisions, a presumption is that the intent is that the one contained in the statute last enacted takes precedence. An extension of this is that where there is conflict in a statute, the text in the section closer to the end generally is given precedence.

**673.** *Schedules.*—The schedule to an Act may provide texts of forms to be used in applying the Act. It is prudent to presume that no material departure from a text so provided is permissive. In other cases schedules consist of particulars. In these instances the adoption of schedules may have been to facilitate

legislative consideration. A schedule is part of the Act and is as much an enactment as any other part. However, should there be contradiction between the terms of the schedule and the enacting provision in the Act itself, auditors may prudently treat the direction in the body of the Act as taking precedence, because a presumption is that closer parliamentary attention was directed to that.

**674.** *Public and Private Acts.*—'Public General Acts' are those which are unlimited in their effect. Almost invariably these Acts originate as Government legislation, but only in the case of fiscal legislation is that a requisite. 'Local and Private Acts' relate either to a limited area or to the affairs of named individuals, and take their origin in petitions, with parliamentary committees considering representations for and against the petition. Rarely has an auditor to consider these Acts. When he does, the rule applicable is:

> In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be for their benefit, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But when the construction is perfectly clear there is no difference between the modes of construing a public Act and a private Act. (*Altrincham Union v. Cheshire Lines Committee*)

# Financial Administration Act

**Chapter 116, R. S., 1952, as amended by chapter 3, Statutes 1955**

An Act to Provide for the Financial Administration of the Government of Canada, the Audit of the Public Accounts and the Financial Control of Crown Corporations.

SHORT TITLE.

Short title.

**1.** This Act may be cited as the *Financial Administration Act.* 1951 (2nd Sess.), c. 12, s. 1.

INTERPRETATION.

Definitions.

**2.** In this Act

"Appropriate Minister."

(*a*) "appropriate Minister" means

(i) with respect to a department mentioned in subparagraph (i) of paragraph (*f*), the Minister presiding over the department,

(ii) with respect to any other department, the Minister designated by the Governor in Council as the appropriate Minister,

(iii) with respect to the Senate and the House of Commons, the respective Speaker, and with respect to the Library of Parliament, the Speakers of the Senate and the House of Commons, and

(iv) with respect to a corporation to which Part VIII applies, the Minister designated by the Governor in Council as the appropriate Minister;

"Appropriation."

(*b*) "appropriation" means any authority of Parliament to pay money out of the Consolidated Revenue Fund;

"Authorized agent."

(*c*) "authorized agent" means any person authorized by the Minister to accept subscriptions for or make sales of securities;

"Comptroller."

(*d*) "Comptroller" means the Comptroller of the Treasury appointed under this Act;

"Consolidated Revenue Fund."

(*e*) "Consolidated Revenue Fund" means the aggregate of all public moneys that are on deposit at the credit of the Receiver General;

"Department."

(*f*) "department" means

(i) any of the departments named in Schedule A,

(ii) any other division or branch of the public service of Canada, including a commission appointed under the *Inquiries Act*, designated by the Governor in Council as a department for the purposes of this Act,

(iii) the staffs of the Senate, the House of Commons and the Library of Parliament, and

(iv) any corporation named in Schedule B;

(*g*) "fiscal agent" means the Bank of Canada and a fiscal agent appointed under Part IV; "Fiscal agent."

(*h*) "fiscal year" means the period from the 1st day of April in one year to the 31st day of March in the next year; "Fiscal year."

(*i*) "Minister" means the Minister of Finance and Receiver General; "Minister."

(*j*) "money" includes negotiable instruments; "Money."

(*k*) "money paid to Canada for a special purpose" includes all money that is paid to a public officer under or pursuant to a statute, trust, treaty, undertaking, or contract, and is to be disbursed for a purpose specified in or pursuant to such statute, trust, treaty, undertaking or contract; "Money paid to Canada for a special purpose."

(*l*) "negotiable instrument" includes any cheque, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and any other similar instrument; "Negotiable instrument."

(*m*) "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes "Public money."

(i) duties and revenues of Canada,

(ii) money borrowed by Canada or received through the issue or sale of securities,

(iii) money received or collected for or on behalf of Canada, and

(iv) money paid to Canada for a special purpose;

(*n*) "public officer" includes a Minister and any person employed in the public service of Canada; "Public officer."

(*o*) "registrar" means the Bank of Canada and a registrar appointed under Part IV; and "Registrar."

(*p*) "securities" means securities of Canada and includes bonds, notes, deposit certificates, non-interest bearing certificates, debentures, treasury bills, treasury notes and any other security representing part of the public debt of Canada. 1951 (2nd Sess.), c. 12, s. 2. "Securities."

*Treasury Board.*

Treasury Board.

**3.** (1) There shall be a board called the Treasury Board, consisting of the Minister of Finance, who is the Chairman, and any five members of the Queen's Privy Council for Canada, who may be nominated from time to time by the Governor in Council.

Alternate members.

(2) The Governor in Council may nominate such additional members of the Queen's Privy Council for Canada as he sees fit to be alternates to serve in the place of members of the Board.

Rules of procedure.

(3) Subject to the terms of this Act and any directions of the Governor in Council, the Treasury Board may determine its own rules and methods of procedure. 1951 (2nd Sess.), c. 12, s. 3.

Staff.

**4.** The Minister may designate an officer of the Department of Finance to be Secretary of the Treasury Board, and shall from among the persons employed in the Department of Finance provide the Board with such other employees as are necessary for the proper conduct of the business of the Board. 1951 (2nd Sess.), c. 12, s. 4.

Duties of Treasury Board.

**5.** (1) The Treasury Board shall act as a committee of the Queen's Privy Council for Canada on all matters relating to finance, revenues, estimates, expenditures and financial commitments, accounts, establishments, the terms and conditions of employment of persons in the public service, and general administrative policy in the public service referred to the Board by the Governor in Council or on which the Board considers it desirable to report to the Governor in Council, or on which the Board considers it necessary to act under powers conferred by this or any other Act.

Authority under other Acts.

(2) The Governor in Council may authorize the Treasury Board to exercise all or any of the powers, other than powers of appointment, of the Governor in Council under the *Civil Service Act,* the *Public Service Superannuation Act,* the *Defence Services Pension Act,* and Parts II to VI of the *Royal Canadian Mounted Police Act.*

Form of accounts of Canada.

(3) The Treasury Board may prescribe from time to time the manner and form in which the accounts of Canada and the accounts of the several departments shall be kept, and may direct any person receiving, managing or disbursing public money to keep any books, records or accounts that the Board considers necessary.

Board subject to directions of Governor in Council.

(4) The Treasury Board in the exercise of its powers under this or any other statute is subject to any direction given to it by the Governor in Council, and the Governor in Council may by order amend or revoke any action of the Board. 1951 (2nd Sess.), c. 12, s. 5.

**6.** The Treasury Board may require from any public officer or any agent of Her Majesty any account, return, statement, document, report or information that the Board considers necessary for the due performance of its duties. 1951 (2nd Sess.), c. 12, s. 6. Board may require production of documents.

**7.** The Treasury Board may make regulations Regulations.

(*a*) respecting the collection, management and administration of, and the accounting for, public money;

(*b*) respecting the keeping of records of property of Her Majesty;

(*c*) subject to any other Act, prescribing rates of compensation, hours of work and other conditions of employment of persons in the public service;

(*d*) notwithstanding the *Civil Service Act,*

(i) authorizing the payment to persons in the public service of compensation or other rewards for inventions or practical suggestions for improvements, and

(ii) governing payments to persons in the public service by way of reimbursement for travelling or other expenses and allowances to meet special expenses arising out of their duties; and

(*e*) subject to any other Act, for any other purpose necessary for the efficient administration of the public service. 1951 (2nd Sess.), c. 12, s. 7.

*Department of Finance.*

**8.** There shall be a department of the Government of Canada called the Department of Finance over which the Minister of Finance and Receiver General appointed by commission under the Great Seal of Canada shall preside. 1951 (2nd Sess.), c. 12, s. 8. Department established.

**9.** The Minister has the management and direction of the Department of Finance, the management of the Consolidated Revenue Fund and the supervision, control and direction of all matters relating to the financial affairs of Canada not by law assigned to any other Minister. 1951 (2nd Sess.), c. 12, s. 9. Management.

**10.** (1) The Governor in Council may appoint an officer, called the Deputy Minister of Finance and Receiver General, to be the deputy head of the Department of Finance and to hold office during pleasure. Deputy Minister.

(2) Subject to section 11, such other officers and employees as are necessary for the proper conduct of the business of the Department shall be appointed in accordance with the provisions of the *Civil Service Act.* 1951 (2nd Sess.), c. 12, s. 10. Other officers, clerks and employees.

**11.** (1) The Governor in Council shall appoint as an officer of the Department of Finance an officer called the Comptroller of the Treasury. Comptroller of the Treasury.



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Salary.

(2) The salary of the Comptroller shall be fixed by the Governor in Council.

Tenure.

(3) The Comptroller shall be appointed to hold office during good behaviour, but he is removable by the Governor in Council for misbehaviour or for incapacity, inability or failure to perform his duties properly, or for other cause.

Removal.

(4) Where the Comptroller is removed from office, the Order in Council providing for his removal and the documents relating thereto shall be laid before Parliament within fifteen days after it is made, or if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

Acting Comptroller.

(5) The Governor in Council may appoint a person to act as Comptroller during the illness, incapacity or other absence of the Comptroller, or during a vacancy in the office of Comptroller. 1951 (2nd Sess.), c. 12, s. 11.

Access to books and records.

**12.** Notwithstanding any Act, the Comptroller is entitled to free access at all convenient times to all files, documents and other records relating to the accounts of every department, and he is also entitled to require and receive from members of the public service such information, reports and explanations as he may deem necessary for the proper performance of his duties. 1951 (2nd Sess.), c. 12, s. 12.

Stationing of officers in other departments.

**13.** The Comptroller may station in any department any person employed in his office to enable him more effectively to carry out his duties, and the department shall provide the necessary office accommodation for any person so stationed. 1951 (2nd Sess.), c. 12, s. 13.

Oath of secrecy.

**14.** (1) The Comptroller shall require every person employed in his office who is to examine the accounts of a department pursuant to this Act to comply with any security requirements applicable to, and to take any oath of secrecy required to be taken by persons employed in that department.

Suspension.

(2) The Comptroller may suspend from the performance of his duties any person employed in his office. 1951 (2nd Sess.), c. 12, s. 14.

Accounting services.

**15.** On the request of the appropriate Minister and with the approval of the Minister of Finance, the Comptroller may

(*a*) provide accounting and other services in connection with the collection and accounting of public money for a department, and

(*b*) examine the collecting and accounting practices applied in a department, and report thereon to the appropriate Minister. 1951 (2nd Sess.), c. 12, s. 15.

## PART II.

### PUBLIC MONEY.

Public money to be deposited.

**16.** (1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General.

Establishment of accounts.

(2) The Minister shall establish, in the name of the Receiver General, accounts with such banks and fiscal agents as he designates for the deposit of public money.

Record of public money collected.

(3) Every person who collects or receives public money shall keep a record of receipts and deposits thereof in such form and manner as the Treasury Board may prescribe by regulation.

Duty of persons collecting public money

(4) Every person employed in the collection or management or charged with the receipt of public money and every other person who collects or receives public money shall pay all public money coming into his hands to the credit of the Receiver General through such officers, banks or persons and in such manner as the Minister directs. 1951 (2nd Sess.), c. 12, s. 16.

Minister may acquire securities.

**17.** (1) The Minister may, when he deems it advisable for the sound and efficient management of public money or the public debt, purchase, acquire and hold securities and pay therefor out of the Consolidated Revenue Fund.

Sale of securities.

(2) The Minister may sell any securities purchased, acquired or held pursuant to subsection (1), and the proceeds of the sales shall be deposited to the credit of the Receiver General.

Profit and loss.

(3) Any net profit resulting in any fiscal year from the purchase, holding or sale of securities pursuant to this section shall be credited to the revenues of that fiscal year, and any net loss resulting in any fiscal year from such purchase, holding or sale shall be charged to an appropriation provided by Parliament for the purpose.

How profit and loss determined.

(4) For the purposes of subsection (3), the net profit or loss in any fiscal year shall be determined by taking into account realized profits and losses on securities sold, the amortization applicable to the fiscal year of premiums and discounts on securities, and interest applicable to the fiscal year. 1951 (2nd Sess.), c. 12, s. 17.

Services.

**18.** Where a service is provided by Her Majesty to any person and the Governor in Council is of opinion that the whole or part of the cost of the service should be borne by the person to whom it is provided, the Governor in Council may, subject to the provisions of any Act relating to that service, by regulation prescribe the fee that may be charged for the service. 1951 (2nd Sess.), c. 12, s. 18.

Return of deposits.

**19.** (1) Where money is received by a public officer from any person as a deposit to ensure the doing of any act or thing, the public officer shall hold or dispose of the money in accordance with regulations of the Treasury Board.



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Return of money paid for purposes not fulfilled.

(2) Where money is paid by any person to a public officer for any purpose that is not fulfilled, the money may, in accordance with regulations of the Treasury Board, be returned or repaid to that person, less such sum as in the opinion of the Board is properly attributable to any service rendered.

Return of non-public money.

(3) Money paid to the credit of the Receiver General and not being public money may be returned or repaid in accordance with regulations of the Treasury Board. 1951 (2nd Sess.), c. 12, s. 19.

Money received for special purpose.

**20.** (1) Money received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to the provisions of any statute applicable thereto.

Interest.

(2) Subject to any other Act, interest may be allowed and paid from the Consolidated Revenue Fund in respect of money to which subsection (1) applies, in accordance with and at rates fixed by the Minister with the approval of the Governor in Council. 1951 (2nd Sess.), c. 12, s. 20.

Refund of money paid in respect of proceedings in Parliament.

**21.** Where the Senate or House of Commons, by resolution or pursuant to any rule or standing order, authorizes a refund of public money that was received in respect of any proceedings before Parliament, the Minister may pay the refund out of the Consolidated Revenue Fund. 1951 (2nd Sess.), c. 12, s. 21.

Remission of taxes and penalties.

**22.** (1) The Governor in Council, on the recommendation of the Treasury Board, whenever he considers it in the public interest, may remit any tax, fee or penalty.

Remission may be partial, etc.

(2) A remission pursuant to this section may be total or partial, conditional or unconditional, and may be granted

(*a*) before, after or pending any suit or proceeding for the recovery of the tax, fee or penalty in respect of which it is granted,

(*b*) before or after any payment thereof has been made or enforced by process or execution, and

(*c*) in the case of a tax or fee, in any particular case or class of case and before the liability therefor arises.

Form of remission.

(3) A remission pursuant to this section may be granted

(*a*) by forbearing to institute a suit or proceeding for the recovery of the tax, fee or penalty in respect of which the remission is granted,

(*b*) by delaying, staying or discontinuing any suit or proceeding already instituted,

(*c*) by forbearing to enforce, staying or abandoning any execution or process upon any judgment,

(*d*) by the entry of satisfaction upon any judgment, or

(*e*) by repaying any sum of money paid to or recovered by the Minister for the tax, fee or penalty.

Conditional remission.

(4) Where a remission is granted under this section subject to a condition, and the condition is not performed, it may be enforced, or all proceedings may be had as if there had been no remission.

Effect of remission.

(5) A conditional remission, upon performance of the condition, and an unconditional remission, have effect as if the remission was made after the tax, fee or penalty in respect of which it was granted had been sued for and recovered.

Customs and Excise.

(6) No tax paid to Her Majesty on any goods shall be remitted by reason only that after the payment of the tax and after release from the control of customs or excise officers, the goods were lost or destroyed.

C.R.F.

(7) Remissions granted under this or any other Act may be paid out of the Consolidated Revenue Fund.

Report.

(8) A statement of each remission of one thousand dollars or more granted under this section shall be reported to the House of Commons in the Public Accounts.

Effect of remission.

(9) Where a penalty imposed by any law relating to the revenue has been wholly and unconditionally remitted pursuant to this section, the remission has the effect of a pardon for the offence for which the penalty was incurred, and thereafter the offence has no legal effect prejudicial to the person to whom the remission was granted.

"Tax" and "penalty" defined.

(10) In this section "tax" includes any tax, impost, duty or toll payable to Her Majesty, imposed or authorized to be imposed by any Act of Parliament, and "penalty" includes any forfeiture or pecuniary penalty imposed or authorized to be imposed by any Act of Parliament for any contravention of the laws relating to the collection of the revenue, or to the management of any public work producing toll or revenue, notwithstanding that part of such forfeiture or penalty is payable to the informer or prosecutor, or to any other person. 1951 (2nd Sess.), c. 12, s. 22.

Uncollectable debts.

**23.** (1) The Governor in Council, on the recommendation of the Treasury Board, may, if he considers it in the public interest, delete from the accounts, in whole or in part, any obligation or debt due to Her Majesty or any claim by Her Majesty,

(*a*) that does not exceed five hundred dollars and has been outstanding for five years or more, or

(*b*) that does not exceed one thousand dollars and has been outstanding for ten years or more.

Report.

(2) The obligations, debts and claims deleted from the Public Accounts under this section during any year shall be reported in the Public Accounts for that year. 1951 (2nd Sess.), c. 12, s. 23.

## PART III.

### PUBLIC DISBURSEMENTS.

No payment out of C.R.F. without authority from Parliament.

**24.** Subject to the *British North America Acts, 1867 to 1951,* no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament. 1951 (2nd Sess.), c. 12, s. 24.

Estimates to be for fiscal year.

**25.** All estimates of expenditures submitted to Parliament shall be for the services coming in course of payment during the fiscal year. 1951 (2nd Sess.), c. 12, s. 25.

Warrant of Governor General.

**26.** Where an appropriation is made for any purpose in any Act of Parliament for granting to Her Majesty any sum of money to defray expenses of the public service for a fiscal year, no payment shall be made pursuant to that appropriation out of the Consolidated Revenue Fund unless a warrant, prepared on the order of the Governor in Council, has been signed by the Governor General authorizing expenditures to be charged against the appropriation, but no payments in excess of the amount of expenditures so authorized shall be made. 1951 (2nd Sess.), c. 12, s. 26.

Payment of guarantee.

**27.** Where a guarantee has been given under the authority of Parliament by or on behalf of Her Majesty for the payment of any debt or obligation, any amount required to be paid by the terms of the guarantee may, subject to the Act authorizing the guarantee, be paid out of the Consolidated Revenue Fund. 1951 (2nd Sess.), c. 12, s. 27.

Urgent expenditure not provided for.

**28.** (1) Where an accident happens to any public work or building when Parliament is not in session and an expenditure for the repair or renewal thereof is urgently required, or where any other matter arises when Parliament is not in session in respect of which an expenditure not foreseen or provided for by Parliament is urgently required for the public good, the Governor in Council, upon the report of the Minister that there is no appropriation for the expenditure, and the report of the appropriate Minister that the expenditure is urgently required, may order a special warrant to be prepared to be signed by the Governor General authorizing the payment of the amount estimated to be required for such expenditure.

Special warrant.

(2) A special warrant issued pursuant to this section shall for the purposes of this Act be deemed to be an appropriation for the fiscal year in which the warrant is issued.

Publication and report to House of Commons.

(3) Every warrant issued under this section shall be published in the *Canada Gazette* within thirty days after it is issued, and a statement showing all warrants issued under this section and the amounts thereof shall be laid by the Minister before the House of Commons within fifteen days after the commencement of the next ensuing session of Parliament.

(4) For the purposes of this section Parliament shall be deemed to be not in session when it is under adjournment *sine die* or to a day more than two weeks after the day the accident happened or the other matter arose. 1951 (2nd Sess.), c. 12, s. 28. When Parliament deemed not in session.

**29.** At the commencement of each fiscal year or at such other times as the Treasury Board may direct, the deputy head or other officer charged with the administration of a service for which there is an appropriation by Parliament or an item included in estimates then before the House of Commons shall prepare and submit to the Treasury Board through the Comptroller a division of such appropriation or item into allotments in the form detailed in the estimates submitted to Parliament for such appropriation or item, or in such other form as the Board may prescribe, and when approved by the Board the allotments shall not be varied or amended without the approval of the Board, and the expenditures charged to the appropriation shall be limited to the amounts of such allotments. 1951 (2nd Sess.), c. 12, s. 29. Appropriation allotments.

**30.** (1) No contract providing for the payment of any money by Her Majesty shall be entered into or have any force or effect unless the Comptroller certifies that there is a sufficient unencumbered balance available out of an appropriation or out of an item included in estimates before the House of Commons to discharge any commitments under such contract that would, under the provisions thereof, come in course of payment during the fiscal year in which the contract was entered into. No contract unless Comptroller certifies.

(2) Every contract involving the payment of money by Her Majesty shall be submitted to the Comptroller as soon as it is made or entered into, unless the Comptroller certifies that he does not require it. Contracts to be submitted to Comptroller.

(3) The Comptroller shall establish and maintain a record of all commitments chargeable to each appropriation. Record of commitments.

(4) Where the Comptroller is satisfied that an agreement was entered into in order to defray an immediate expenditure that, through accident to public property or other emergency, was necessary to protect such property or to provide for such emergency, he may issue his certificate accordingly and thereupon the agreement is exempt from the operation of subsection (1) from the time the agreement was entered into. 1951 (2nd Sess.), c. 12, s. 30. Where immediate expenditure required.

**31.** (1) No charge shall be made against an appropriation except upon the requisition of the appropriate Minister of the department for which the appropriation was made, or by a person authorized by him in writing. Requisitions.

(2) Every requisition for a payment out of the Consolidated Revenue Fund shall be in such form, accompanied by such documents and certified in such manner as the Comptroller may require. Form.

When requisition to be rejected.

(3) The Comptroller shall reject a requisition if he is of the opinion that the payment

(*a*) would not be a lawful charge against the appropriation,

(*b*) would result in an expenditure in excess of the appropriation, or

(*c*) would reduce the balance available in the appropriation so that it would not be sufficient to meet the commitments charged against it.

Reference to Treasury Board.

(4) The Comptroller may transmit to the Treasury Board any requisition with respect to which he desires the direction of the Board, and the Board may order that payment be made or refused.

Idem.

(5) Where the Comptroller

(*a*) declines to make a payment,

(*b*) disallows an item in an account, or

(*c*) refuses to give a certificate required by this Act,

the appropriate Minister of the department concerned may report the circumstances to the Treasury Board for its decision, and the Board may confirm or overrule the action of the Comptroller and give such directions as are necessary to carry out its decision.

Expenses of Parliament.

(6) Whenever the Comptroller is of the opinion that a doubt exists as to the legality or otherwise of a proposed charge to an appropriation provided for the expenses of the Senate, the House of Commons or the Library of Parliament, he shall forthwith, through the Minister, draw the matter to the attention of the appropriate Minister who shall obtain a decision in accordance with such procedure as may from time to time be prescribed by the Senate or the House of Commons as the case may be or, in the case of the Library of Parliament, by the Senate and the House of Commons, and the Comptroller shall act in accordance with the decision.

Cost audits.

(7) Where, in respect of any contract under which a cost audit is required to be made, the Comptroller reports that any costs or charges claimed by the contractor should not in the opinion of the Comptroller be allowed, such costs or charges shall not be allowed to the contractor unless the Treasury Board otherwise directs. 1951 (2nd Sess.), c. 12, s. 31.

Payment for work or goods.

**32.** No payment shall be made for the performance of work or the supply of goods, whether under contract or not, in connection with any part of the public service, unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister or other officer authorized by such Minister certifies

(*a*) that the work has been performed or the material supplied or both, as the case may be, and that the price charged is according to contract, or if not specified by contract, is reasonable, or

(*b*) where a payment is to be made before completion of the work or delivery of the goods, that the payment is in accordance with the contract. 1951 (2nd Sess.), c. 12, s. 32.

Form of payments out of C.R.F.

**33.** (1) Every payment pursuant to an appropriation, except a payment made under subsection (2), shall be made under the direction and control of the Comptroller by cheque drawn on the account of the Receiver General or other instrument, in such form and authenticated in such manner as the Treasury Board directs.

Where cheques, etc. payable.

(2) Where an instrument issued under subsection (1) is presented by a bank to the Receiver General for payment, the Receiver General, or an officer authorized by him, may pay the instrument out of the Consolidated Revenue Fund. 1951 (2nd Sess.), c. 12, s. 33.

Cancelled cheques, etc.

**34.** (1) Every cheque or other instrument issued under the direction of the Comptroller, when paid, shall be delivered into the custody of the Minister for examination and adjustment with the statements of cheques or other instruments issued.

Destruction.

(2) The Treasury Board on the recommendation of the Auditor General may make regulations governing the destruction from time to time of such cheques or other instruments. 1951 (2nd Sess.), c. 12, s. 34.

Lapsing of appropriations.

**35.** The balance of an appropriation granted for a fiscal year that remains unexpended at the end of the fiscal year shall lapse, except that during the thirty days immediately following the end of the fiscal year a payment may be made under the appropriation for the purpose of discharging a debt payable

(*a*) during or prior to the fiscal year, or

(*b*) during the said thirty days for goods received or services rendered prior to the end of the fiscal year,

and such payment may be charged in the accounts for the fiscal year. 1951 (2nd Sess.), c. 12, s. 35.

Accountable advances.

**36.** (1) The Treasury Board may make regulations authorizing the making of accountable advances chargeable to the appropriation for the service in respect of which the advance is made.

Repayment.

(2) An advance for which an accounting has not been made at the termination of the fiscal year in which it was made shall be repaid or accounted for within thirty days thereafter or within such additional number of days, not exceeding thirty, as the Comptroller may fix in any particular case or class of case.

Recovery.

(3) The Comptroller may recover any accountable advance or any portion thereof that is not repaid or accounted for as required by subsection (2) out of any moneys payable by Her Majesty to the person to whom the advance was made.



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Report.

(4) Every accountable advance that is not repaid or accounted for as required by this section shall be reported in the Public Accounts. 1951 (2nd Sess.), c. 12, s. 36.

Refunds.

**37.** An amount received as a refund or repayment of an expenditure or advance and deposited to the credit of the Receiver General shall be included in the unexpended balance of the appropriation against which it was charged. 1951 (2nd Sess.), c. 12, s. 37.

Term of contract that money available.

**38.** It is a term of every contract providing for the payment of any money by Her Majesty that payment thereunder is subject to there being an appropriation for the particular service for the fiscal year in which any commitment thereunder would come in course of payment. 1951 (2nd Sess.), c. 12, s. 38.

Regulations, *re* conditions under which contracts awarded.

**39.** The Governor in Council may make regulations with respect to the conditions under which contracts may be entered into and, notwithstanding any other Act,

(*a*) may direct that no contract by the terms of which payments are required in excess of such amount or amounts as the Governor in Council may prescribe shall be entered into or have any force or effect unless entry into the contract has been approved by the Governor in Council or the Treasury Board, and

(*b*) may make regulations with respect to the security to be given to and in the name of Her Majesty to secure the due performance of contracts. 1951 (2nd Sess.), c. 12, s. 39.

Holdbacks.

**40.** Where a payment under a contract is withheld to ensure the due performance of the contract, the payment may, subject to this Act, be charged to the appropriation for that contract, and the amount so charged may be credited to a special account in the Consolidated Revenue Fund, to be paid out in accordance with the contract under regulations of the Treasury Board. 1951 (2nd Sess.), c. 12, s. 40.

## PART IV.

### PUBLIC DEBT.

No money to be borrowed or security issued without authority of Parliament.

**41.** No money shall be borrowed or security issued by or on behalf of Her Majesty without the authority of Parliament. 1951 (2nd Sess.), c. 12, s. 41.

The raising of loans.

**42.** Where authority is conferred by Parliament to borrow money on behalf of Her Majesty, the Governor in Council, subject to the Act authorizing the borrowing, may authorize the Minister

(*a*) to borrow the money by the issue and sale of securities in such form, for such separate sums, at such rate of interest and upon such other terms and conditions as the Governor in Council may approve, and

(*b*) to enter into such contracts or agreements relating to the borrowing of the money or the issue or sale of securities relating thereto on such terms and conditions as the Governor in Council may approve. 1951 (2nd Sess.), c. 12, s. 42.

Loans for redemption of securities.

**43.** The Governor in Council may authorize the Minister to borrow such sums of money as are required for the payment of any securities that were issued under the authority of Parliament, other than section 44, and are maturing or have been called for redemption. 1951 (2nd Sess.), c. 12, s. 43.

Temporary loans.

**44.** Where it appears to the Governor in Council that the Consolidated Revenue Fund will be insufficient to meet the disbursements lawfully authorized to be made from it, the Governor in Council may authorize the Minister to borrow, at such rate of interest and on such terms and conditions as the Governor in Council may approve, for a period not exceeding six months, an amount not exceeding such amount as he deems necessary to ensure that the Consolidated Revenue Fund will be sufficient to meet those disbursements. 1951 (2nd Sess.), c. 12, s. 44.

Report to Parliament.

**45.** An annual statement of all borrowing transactions on behalf of Her Majesty shall be included in the Public Accounts. 1951 (2nd Sess.), c. 12, s. 45.

Signing securities.

**46.** (1) Securities issued under the authority of this Part shall be signed by the Deputy Minister of Finance or an officer of the Department of Finance designated by the Governor in Council to sign on behalf of the Deputy Minister of Finance, and shall be countersigned by such officer of the Department of Finance or other person as the Governor in Council designates for that purpose.

Facsimile signatures.

(2) The Minister may direct that there be substituted for signatures in the proper handwriting of one or both of the persons authorized to sign or countersign securities under this section, facsimiles thereof printed from engraving.

Printing of signatures.

(3) Where both the signature and countersignature on a security issued under this section are to be printed, they shall be printed, together with a distinguishing mark, from engraving, on the securities after they have been delivered to the Minister, a registrar or a fiscal agent and while the securities are in the custody and control of the Minister, registrar or fiscal agent. 1951 (2nd Sess.), c. 12, s. 46.



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Registrars and fiscal agents.

**47.** The Governor in Council may

(*a*) appoint one or more registrars to perform such services in respect of the registration of loans as the Governor in Council may prescribe,

(*b*) appoint one or more fiscal agents to perform such services in respect of loans as the Governor in Council may prescribe, and

(*c*) fix the remuneration or compensation of any registrar or fiscal agent appointed under this section. 1951 (2nd Sess.), c. 12, s. 47.

Records of money borrowed.

**48.** (1) The Minister shall cause to be maintained a system of books and records

(*a*) showing all money authorized by Parliament to be borrowed by the issue and sale of securities,

(*b*) containing a description and record of all money so borrowed and securities issued, and

(*c*) showing all amounts paid in respect of the principal of or interest on all money so borrowed.

Accounting by fiscal agents and registrars.

(2) Every fiscal agent and registrar shall annually and as often as required by the Minister give to the Minister an accounting, in such form and terms and containing such information as the Minister prescribes, of all his transactions as fiscal agent or registrar. 1951 (2nd Sess.), c. 12, s. 48.

Sinking fund.

**49.** The Governor in Council may provide for the creation and management of a sinking fund with respect to any issue of securities or with respect to all securities issued. 1951 (2nd Sess.), c. 12, s. 49.

Borrowed money and interest charge on C.R.F.

**50.** The payment of all money borrowed and interest thereon and of the principal of and interest on all securities issued by or on behalf of Her Majesty with the authority of Parliament is a charge on and payable out of the Consolidated Revenue Fund. 1951 (2nd Sess.), c. 12, s. 50.

Payment of loan expenses out of C.R.F.

**51.** All money required under section 49 to provide a sinking fund or other means of securing repayment of securities, the remuneration and compensation of registrars and fiscal agents appointed under section 47 and all costs, expenses and charges incurred in the negotiation or raising of loans or in the issue, redemption, servicing, payment and management of any loan and any securities issued in respect thereof, may, with the authority of the Governor in Council, be paid out of the Consolidated Revenue Fund. 1951 (2nd Sess.), c. 12, s. 51.

**52.** Where it is provided by a prospectus or other official notice issued by or under the authority of the Minister that a subscriber may purchase securities Payment for securities to agent or by salary deduction.

(*a*) by payments to an authorized agent, or

(*b*) by deductions from the remuneration of the subscriber by his employer,

the amount of any such payment or deduction that has not been accounted for by the delivery of securities to the subscriber or repaid to the subscriber shall be deemed to be money received in trust for Her Majesty by the agent or employer for which he is accountable to Her Majesty under section 89, and for the purpose of the *Bankruptcy Act* and the *Winding-up Act,* where the money paid or deducted cannot be identified among the assets of the employer or agent, a portion of the said assets equal in value to the amount of the payment or deduction shall be deemed to be segregated and held in trust for Her Majesty. 1951 (2nd Sess.), c. 12, s. 52.

**53.** There shall be established in the Consolidated Revenue Fund an account to be known as the Investors' Indemnity Account to which shall be credited the sum of twenty-five thousand dollars, such further amounts as are appropriated by Parliament for the purposes of this section, and any recoveries of the losses referred to in section 54. 1951 (2nd Sess.), c. 12, s. 53. Investors' Indemnity Account.

**54.** The Minister may, in accordance with and subject to the regulations, pay out of the Investors' Indemnity Account any losses sustained by subscribers for securities who have paid all or part of the purchase price of such securities but have not received the security or repayment of the amount so paid, and losses sustained by any person in the redemption of securities. 1951 (2nd Sess.), c. 12, s. 54. Payment of losses.

**55.** Her Majesty and a fiscal agent or registrar acting as such are not bound to see to the execution of any express or implied trust to which any securities are subject. 1951 (2nd Sess.), c. 12, s. 55. Not bound to execute trusts.

**56.** The Governor in Council may make such regulations as he deems necessary to provide for the management of the public debt of Canada and the payment of interest thereon and, without limiting the generality of the foregoing, may make regulations Regulations.

(*a*) for the inscription or registration of securities and prescribing the effect of such inscription or registration,

(*b*) for the transfer, transmission, exchange, redemption, cancellation and destruction of any securities, and, without limiting the generality of the foregoing,

(i) for the transmission, transfer or redemption of securities pursuant to judgment or as the result of the death, dissolution or bankruptcy of the registered owner thereof, and

(ii) prescribing the conditions upon which the transfer, transmission, exchange and redemption of securities registered in the names of infants, minors or other persons not of full capacity to enter into ordinary contracts, may be made,

(*c*) for the issue of securities or making of payments in respect of damaged, lost, stolen or destroyed securities or interest coupons, and of the cheques pertaining thereto and prescribing conditions to such issue or payment,

(*d*) requiring guarantees to be given to the registrar in such manner and by such persons as the regulations may prescribe, before the registrar is authorized to make any entry in the register,

(*e*) authorizing the correction by the registrar, in such circumstances as may be prescribed by the regulations, of errors in the register and otherwise authorizing rectification of the register, and

(*f*) providing for the payment of losses out of the Investors' Indemnity Account. 1951 (2nd Sess.), c. 12, s. 56.

## PART V.

### PUBLIC STORES.

Stores records.

**57.** Every department shall maintain adequate records of stores and the appropriate Minister or such other authority as the Governor in Council may direct may make rules and give directions governing the acquisition, receipt, custody, issue and control of such stores. 1951 (2nd Sess.), c. 12, s. 57.

Revolving fund.

**58.** (1) Subject to this section, where Parliament has authorized a department to operate a revolving fund for the purpose of acquiring and managing stores or for manufacturing, producing, processing or dealing in stores or materials, and has fixed the amount that may be charged to that revolving fund at any time,

(*a*) payments may be made out of the Consolidated Revenue Fund for these purposes subject to such terms and conditions as the Treasury Board may prescribe, and

(*b*) the Comptroller shall keep an account to which shall be charged

(i) the cost of such of the stores and materials on hand in the department at the time the revolving fund is established as the Treasury Board may prescribe, and

(ii) the payments made under paragraph (*a*).

(2) There shall be shown as credits in the account Credits.

(*a*) all money received by the Receiver General in respect of operations of the revolving fund, and

(*b*) amounts charged to appropriations as the reimbursement of costs charged to the revolving fund of stores or material issued or work performed in respect of services for which the appropriations were made.

(3) A payment made out of the Consolidated Revenue Fund pursuant to subsection (1) together with the balance of the revolving fund shall not be greater than the amount fixed by Parliament as the amount that may be charged to the revolving fund at any time or such lesser amount as the Treasury Board may prescribe. Limit.

(4) For the purposes of this section "balance of the revolving fund" means the aggregate of all payments charged to the revolving fund, less all credits to the revolving fund. "Balance of the revolving fund" defined.

(5) At the end of each fiscal year the value of the inventory held and accounts receivable in respect of the operations of a revolving fund shall be determined in accordance with regulations of the Treasury Board, and if such value added to the receipts shown in the revolving fund, exceeds the total of expenditures shown in the revolving fund and liabilities in respect of operations of the revolving fund then due and payable, the excess shall be transferred from the revolving fund as revenue, but if the value is less no amount may be credited to the revolving fund to meet the deficiency except with the authority of Parliament. 1951 (2nd Sess.), c. 12, s. 58. Value of inventories.

**59.** All accounting transactions with respect to a revolving fund under this Part shall be recorded at cost, but for the purpose of valuing stores or materials on hand at the time the revolving fund is established and of valuing inventories and issues of stores and materials, cost may be determined in accordance with such recognized accounting practices as the appropriate Minister with the approval of the Treasury Board, may direct. 1951 (2nd Sess.), c. 12, s. 59. Accounting transactions to be recorded at cost.

**60.** (1) The appropriate Minister may from time to time, but not less frequently than once in every five years, constitute a board of survey to enquire into the state of the stores under the management of a department. Board of survey.

(2) Where a board of survey constituted under subsection (1) recommends the deletion from inventory of any obsolete or unserviceable stores or materials or any stores or materials lost or destroyed, the appropriate Minister with the approval of the Treasury Board, may direct the deletion of all or any part of such stores or materials from the inventory, but the value of stores or materials so deleted shall not be credited to a revolving fund except with the authority of Parliament. Deletion of stores.

Report

(3) A statement in such form as the Treasury Board prescribes of all stores and materials deleted from inventories pursuant to subsection (2) shall be included annually in the Public Accounts. 1951 (2nd Sess.), c. 12, s. 60.

Records.

**61.** The Comptroller may examine records, accounts and procedures respecting stores and materials and report thereon to the Minister or the appropriate Minister. 1951 (2nd Sess.), c. 12, s. 61.

"Stores", "materials", "issues" defined.

**62.** For the purposes of this Part, the Treasury Board may by regulation define for any department the expressions "stores", "materials" and "issues". 1951 (2nd Sess.), c. 12, s. 62.

## PART VI.

### PUBLIC ACCOUNTS.

Accounts of Canada.

**63.** (1) The Minister shall cause accounts to be kept in such a manner as to show,

(*a*) the expenditures made under and commitments chargeable against each appropriation,

(*b*) the revenues of Canada, and

(*c*) the other payments into and out of the Consolidated Revenue Fund.

Assets and liabilities.

(2) Subject to regulations of the Treasury Board, the Minister

(*a*) shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada, and

(*b*) may establish such reserves with respect to the assets and liabilities,

as in his opinion are required to give a true and fair view of the financial position of Canada.

How kept.

(3) The accounts of Canada shall be kept in the currency of Canada. 1951 (2nd Sess.), c. 12, s. 63.

Submission of Public Accounts to Parliament.

**64.** (1) An annual report, called the Public Accounts, shall be laid before the House of Commons by the Minister on or before the 31st day of December, or if Parliament is then not in session, within fifteen days after the commencement of the next ensuing session.

Contents of Public Accounts.

(2) The Public Accounts shall be in such form as the Minister may direct, and shall include:

(*a*) a report on the financial transactions of the fiscal year;

(*b*) a statement, certified by the Auditor General, of the expenditures and revenues of Canada for the fiscal year;

(*c*) a statement, certified by the Auditor General, of such of the assets and liabilities of Canada as in the opinion of the Minister are required to show the financial position of Canada as at the termination of the fiscal year;

(*d*) the contingent liabilities of Canada; and

(*e*) such other accounts and information as are necessary to show, with respect to the fiscal year, the financial transactions and financial position of Canada, or are required by any Act to be shown in the Public Accounts. 1951 (2nd Sess.), c. 12, s. 64.

## PART VII.

### THE AUDITOR GENERAL.

Auditor General.

**65.** (1) The Governor in Council shall by commission under the Great Seal of Canada appoint an officer called the Auditor General of Canada to hold office during good behaviour until he attains the age of sixty-five years, but he is removable by the Governor General on address of the Senate and House of Commons.

Salary.

(2) The Auditor General shall out of the Consolidated Revenue Fund be paid a salary of twenty thousand dollars per annum.

(3) The provisions of the *Public Service Superannuation Act*, except those relating to tenure of office, apply to the Auditor General.

Officers, etc.

(4) Such officers and employees as are necessary to enable the Auditor General to perform his duties shall be appointed in accordance with the provisions of the *Civil Service Act*.

Acting Auditor General.

(5) The Governor in Council may appoint a person temporarily to perform the duties of the Auditor General during a vacancy in the office of Auditor General. 1951 (2nd Sess.), c. 12, s. 65; 1955, c. 3.

Access to books, files, etc.

**66.** (1) Notwithstanding any Act, the Auditor General is entitled to free access at all convenient times to all files, documents and other records relating to the accounts of every department, and he is also entitled to require and receive from members of the public service such information, reports and explanations as he may deem necessary for the proper performance of his duties.

Stationing of officers in other departments.

(2) The Auditor General may station in any department any person employed in his office to enable him more effectively to carry out his duties, and the department shall provide the necessary office accommodation for any such officer so stationed.

Oath of secrecy.

(3) The Auditor General shall require every person employed in his office who is to examine the accounts of a department pursuant to this Act to comply with any security requirements applicable to, and to take any oath of secrecy required to be taken by persons employed in that department.

Suspension.

(4) The Auditor General may suspend from the performance of his duty any person employed in his office. 1951 (2nd Sess.), c. 12, s. 66.

Accounts relating to Consolidated Revenue Fund.

**67.** The Auditor General shall examine in such manner as he may deem necessary the accounts relating to the Consolidated Revenue Fund and to public property and shall ascertain whether in his opinion

(*a*) the accounts have been faithfully and properly kept,

(*b*) all public money has been fully accounted for, and the rules and procedures applied are sufficient to secure an effective check on the assessment, collection and proper allocation of the revenue,

(*c*) money has been expended for the purposes for which it was appropriated by Parliament, and the expenditures have been made as authorized, and

(*d*) essential records are maintained and the rules and procedures applied are sufficient to safeguard and control public property. 1951 (2nd Sess.), c. 12, s. 67.

Registrar's accounts.

**68.** The Auditor General shall

(*a*) make such examination of the accounts and records of each registrar as he deems necessary, and such other examinations of a registrar's transactions as the Minister may require, and

Destruction of cancelled securities.

(*b*) when and to the extent required by the Minister, participate in the destruction of any redeemed or cancelled securities or unissued reserves of securities, authorized to be destroyed under this Act,

and may, by arrangement with the registrar, maintain custody and control, jointly with the registrar, of cancelled and unissued securities. 1951 (2nd Sess.), c. 12, s. 68.

Certificates.

**69.** The Auditor General shall examine and certify in accordance with the outcome of his examinations the several statements required by section 64 to be included in the Public Accounts, and any other statement that the Minister may present for audit certificate. 1951 (2nd Sess.), c. 12, s. 69.

Report to House of Commons.

**70.** (1) The Auditor General shall report annually to the House of Commons the results of his examinations and shall call attention to every case in which he has observed that

(*a*) any officer or employee has wilfully or negligently omitted to collect or receive any money belonging to Canada,

(*b*) any public money was not duly accounted for and paid into the Consolidated Revenue Fund,

(*c*) any appropriation was exceeded or was applied to a purpose or in a manner not authorized by Parliament,

(*d*) an expenditure was not authorized or was not properly vouched or certified,

(*e*) there has been a deficiency or loss through the fraud, default or mistake of any person, or

(*f*) a special warrant authorized the payment of any money,

and to any other case that the Auditor General considers should be brought to the notice of the House of Commons.

When report to be tabled.

(2) The report of the Auditor General shall be laid before the House of Commons by the Minister on or before the 31st day of December, or, if Parliament is then not in session, within fifteen days after the commencement of the next ensuing session and if the Minister does not, within the time prescribed by this section, present the report to the House of Commons, the Auditor General shall transmit the report to the Speaker for tabling in the House of Commons. 1951 (2nd Sess.), c. 12, s. 70.

Inquiry and report.

**71.** The Auditor General shall, whenever the Governor in Council, the Treasury Board or the Minister directs, inquire into and report on any matter relating to the financial affairs of Canada or to public property and on any person or organization that has received financial aid from the Government of Canada or in respect of which financial aid from the Government of Canada is sought. 1951 (2nd Sess.), c. 12, s. 71.

Reports to be made through Minister.

**72.** Any report of the Auditor General to the Governor in Council or the Treasury Board shall be made through the Minister. 1951 (2nd Sess.), c. 12, s. 72.

Improper retention of public money.

**73.** Whenever it appears to the Auditor General that any public money has been improperly retained by any person, he shall forthwith report the circumstances of such cases to the Minister. 1951 (2nd Sess.), c. 12, s. 73.

Inquiries.

**74.** The Auditor General may examine any person on oath on any matter pertaining to any account subject to audit by him and for the purposes of any such examination the Auditor General may exercise all the powers of a commissioner under Part I of the *Inquiries Act*. 1951 (2nd Sess.), c. 12, s. 74.

Audit of office of Auditor General.

**75.** An officer of the public service nominated by the Treasury Board shall examine and certify to the House of Commons in accordance with the outcome of his examinations the receipts and disbursements of the office of the Auditor General. 1951 (2nd Sess.), c. 12, s. 75.

## PART VIII

### CROWN CORPORATIONS.

**76.** (1) In this Part

"Agency corporation."

(*a*) "agency corporation" means a Crown corporation named in Schedule C;

"Auditor."

(*b*) "auditor" means, in relation to a corporation, the person authorized by Parliament to audit the accounts and financial transactions of the corporation;

"Crown corporation."

(*c*) "Crown corporation" means a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and includes the corporations named in Schedule B, Schedule C and Schedule D;

"Departmental corporation."

(*d*) "departmental corporation" means a Crown corporation named in Schedule B; and

"Proprietary corporation."

(*e*) "proprietary corporation" means a Crown corporation named in Schedule D.

Deletions from Schedule.

(2) The Governor in Council may by order delete the name of any corporation from Schedule B, Schedule C or Schedule D and shall thereupon add the name of that corporation to the appropriate schedule in accordance with subsection (3).

Additions to Schedule.

(3) The Governor in Council may by order

(*a*) add to Schedule B any Crown corporation that is a servant or agent of Her Majesty in right of Canada and is responsible for administrative, supervisory or regulatory services of a governmental nature;

(*b*) add to Schedule C any Crown corporation that is an agent of Her Majesty in right of Canada and is responsible for the management of trading or service operations on a quasi-commercial basis, or for the management of procurement, construction or disposal activities on behalf of Her Majesty in right of Canada; and

(*c*) add to Schedule D any Crown corporation that

(i) is responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public, and

(ii) is ordinarily required to conduct its operations without appropriations. 1951 (2nd Sess.), c. 12, s. 76.

G. in C. to designate auditor.

**77.** (1) Where, in respect of a Crown corporation

(*a*) no provision is made in any Act for the appointment of an auditor to audit the accounts and financial transactions of the corporation, or

(*b*) the auditor is to be appointed pursuant to the *Companies Act*, the Governor in Council shall designate a person to audit the accounts and financial transactions of the corporation.

(2) Notwithstanding any other Act, the Auditor General is eligible to be appointed the auditor, or a joint auditor, of a Crown corporation. 1951 (2nd Sess.), c. 12, s. 77. Auditor General eligible.

**78.** (1) Sections 79 to 88, both inclusive, apply to agency corporations and proprietary corporations, but in the event of any inconsistency between the provisions thereof and the provisions of any other Act, the provisions of such other Act prevail. Application.

(2) This Part does not apply to departmental corporations except as provided in section 76. 1951 (2nd Sess.), c. 12, s. 78. Exception.

**79.** The financial year of a corporation is the calendar year, unless the Governor in Council otherwise directs. 1951 (2nd Sess.), c. 12, s. 79. Financial year.

**80.** (1) Each agency corporation shall annually submit to the appropriate Minister an operating budget for the next following financial year of the corporation for the approval of the appropriate Minister and the Minister of Finance. Budgets.

(2) For each corporation the appropriate Minister shall annually lay before Parliament the capital budget for its financial year approved by the Governor in Council on the recommendation of the appropriate Minister and the Minister of Finance. Idem.

(3) The Treasury Board, on the joint recommendation of the Minister of Finance and the appropriate Minister, may by regulation prescribe the form in which budgets required by this section shall be prepared. 1951 (2nd Sess.), c. 12, s. 80. Form.

**81.** (1) A corporation may, with the approval of the Minister of Finance, maintain in its own name one or more accounts in the Bank of Canada or in such bank in Canada or financial institution outside of Canada as the Minister of Finance may approve. Bank accounts.

(2) The Minister of Finance may, with the concurrence of the appropriate Minister, direct a corporation to pay all or any part of the money of the corporation to the Receiver General to be placed to the credit of a special account in the Consolidated Revenue Fund in the name of the corporation, and the Minister of Finance may pay out, for the purposes of the corporation, or repay to the corporation, all or any part of the money in the special account. Receiver General account.

(3) Notwithstanding the other provisions of this section, where the appropriate Minister and the Minister of Finance, with the approval of the Governor in Council, so direct, a corporation shall pay to the Payment over of surplus money.

Receiver General so much of the money administered by it as the appropriate Minister and the Minister of Finance consider to be in excess of the amount required for the purposes of the corporation, and any money so paid may be applied towards the discharge of any obligation of the corporation to Her Majesty, or may be applied as revenues of Canada. 1951 (2nd Sess.), c. 12, s. 81.

Loans to corporations.

**82.** (1) At the request of the appropriate Minister, and subject to the approval of the Governor in Council, the Minister of Finance may from time to time lend money to a corporation for working capital out of money in the Consolidated Revenue Fund.

Limit.

(2) The aggregate amount of loans outstanding made to any one corporation under this section shall not at any time exceed five hundred thousand dollars.

Terms.

(3) A loan under this section is subject to such terms and conditions as the Governor in Council approves and is repayable within a period not exceeding twelve months from the day on which the loan was made.

Report to Parliament.

(4) A report of every loan to a corporation under this section shall be laid by the Minister of Finance before Parliament within fifteen days after it is made or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session. 1951 (2nd Sess.), c. 12, s. 82.

Awarding of contracts.

**83.** The Governor in Council may make regulations with respect to the conditions upon which an agency corporation may undertake contractual commitments. 1951 (2nd Sess.), c. 12, s. 83.

Reserves.

**84.** Subject to any order of the Governor in Council made on the joint recommendation of the Minister of Finance and the appropriate Minister, a corporation may make provision for reserves for depreciation of assets, for uncollectable accounts and for other purposes. 1951 (2nd Sess.), c. 12, s. 84.

Books.

**85.** (1) A corporation shall keep proper books of account and proper records in relation thereto.

Statement of accounts.

(2) Subject to such directions as to form as the Minister of Finance and the appropriate Minister may jointly give, a corporation shall prepare in respect of each financial year statements of accounts which shall include

(*a*) a balance sheet, a statement of income and expense and a statement of surplus, containing such information as, in the case of a company incorporated under the *Companies Act,* is required to be laid before the company by the directors at an annual meeting, and

(*b*) such other information in respect of the financial affairs of the corporation as the appropriate Minister or the Minister of Finance may require.

Annual report.

(3) A corporation shall, as soon as possible, but within three months after the termination of each financial year submit an annual report to the appropriate Minister in such form as he may prescribe, which shall include the statement of accounts specified in subsection (2), and the appropriate Minister shall lay the report before Parliament within fifteen days after he receives it or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session.

Reports to Minister.

(4) A corporation shall make to the appropriate Minister such reports of its financial affairs as he requires. 1951 (2nd Sess.), c. 12, s. 85.

Access to books, etc.

**86.** The auditor is entitled to have access at all convenient times to all records, documents, books, accounts and vouchers of a corporation, and is entitled to require from the directors and officers of the corporation such information and explanations as he deems necessary. 1951 (2nd Sess.), c. 12, s. 86.

Auditor's report.

**87.** (1) The auditor shall report annually to the appropriate Minister the result of his examination of the accounts and financial statements of a corporation, and the report shall state whether in his opinion

(*a*) proper books of account have been kept by the corporation;

(*b*) the financial statements of the corporation

(i) were prepared on a basis consistent with that of the preceding year and are in agreement with the books of account,

(ii) in the case of the balance sheet, give a true and fair view of the state of the corporation's affairs as at the end of the financial year, and

(iii) in the case of the statement of income and expense, give a true and fair view of the income and expense of the corporation for the financial year; and

(*c*) the transactions of the corporation that have come under his notice have been within the powers of the corporation under this Act and any other Act applicable to the corporation;

and the auditor shall call attention to any other matter falling within the scope of his examination that in his opinion should be brought to the attention of Parliament.

Other reports.

(2) The auditor shall from time to time make to the corporation or to the appropriate Minister such other reports as he may deem necessary or as the appropriate Minister may require.

Annual report.

(3) The annual report of the auditor shall be included in the annual report of the corporation.

(4) Notwithstanding section 78, this section operates in lieu of section 124 of the *Companies Act*. 1951 (2nd Sess.), c. 12, s. 87.

Report. through Minister.

**88.** In any case where the auditor is of the opinion that any matter in respect of a corporation should be brought to the attention of the Governor in Council, the Treasury Board or the Minister of Finance, such report shall be made forthwith through the appropriate Minister. 1951 (2nd Sess.), c. 12, s. 88.

## PART IX.

### CIVIL LIABILITY AND OFFENCES.

Notice to persons failing to pay over public money.

**89.** (1) Whenever the Minister has reason to believe that any person

(*a*) has received money for Her Majesty and has not duly paid it over,

(*b*) has received money for which he is accountable to Her Majesty and has not duly accounted for it, or

(*c*) has in his hands any public money applicable to any purpose and has not duly applied it,

the Minister may cause a notice to be served on such person, or on his representative in case of his death, requiring him within such time from the service of the notice as may be named therein, duly to pay over, account for, or apply such money, as the case may be, and to transmit to the Minister proper vouchers that he has done so.

Proceedings where notice not complied with.

(2) Where a person has failed to comply with a notice served on him under subsection (1) within the time stated therein, the Minister shall state an account between such person and Her Majesty, showing the amount of the money not duly paid over, accounted for or applied, as the case may be, and, in the discretion of the Minister, charging interest on the whole or any part thereof at the rate of five per cent per annum from such date as the Minister may determine, and in any proceedings for the recovery of such money a copy of the account stated by the Minister, certified by him, shall be *prima facie* evidence that the amount stated therein, together with interest, is due and payable to Her Majesty, without proof of the signature of the Minister or his official character, and without further proof thereof, and such amount and interest may be recovered as a debt due to Her Majesty. 1951 (2nd Sess.), c. 12, s. 89.

Evidence.

**90.** Where it appears

(*a*) by the books or accounts kept by or in the office of any person employed in the collection or management of the revenue,

(*b*) in any accounting by such person, or

(*c*) by his written acknowledgment or confession,

that such person has, by virtue of his office or employment, received money belonging to Her Majesty and has refused or neglected to pay over such money to the proper persons at the proper times, an affidavit deposing to such facts, taken by any person having knowledge thereof, shall, in any proceedings for the recovery of such money, be received in evidence and shall be *prima facie* proof of the facts stated therein. 1951 (2nd Sess.), c. 12, s. 90.

Liability for loss.

**91.** Where by reason of any malfeasance, wilful neglect of duty or gross negligence by any person employed in collecting or receiving any public money, any sum of money is lost to Her Majesty, such person is accountable for such sum as if he had collected and received it and it may be recovered from him as if he had collected and received it. 1951 (2nd Sess.), c. 12, s. 91.

Offences.

**92.** Every officer or person acting in any office or employment connected with the collection, management or disbursement of public money who

(*a*) receives any compensation or reward for the performance of any official duty, except as by law prescribed;

(*b*) conspires or colludes with any other person to defraud Her Majesty, or makes opportunity for any person to defraud Her Majesty;

(*c*) designedly permits any violation of the law by any other person;

(*d*) wilfully makes or signs any false entry in any book, or wilfully makes or signs any false certificate or return in any case in which it is his duty to make an entry, certificate or return;

(*e*) having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against Her Majesty, under any revenue law of Canada, fails to report, in writing, such knowledge or information to his superior officer; or

(*f*) demands or accepts or attempts to collect, directly or indirectly, as payment or gift or otherwise, any sum of money, or other thing of value, for the compromise, adjustment or settlement of any charge or complaint for any violation or alleged violation of law,

is guilty of an indictable offence, and is liable on conviction to a fine not exceeding five hundred dollars, and to imprisonment for any term not exceeding five years. 1951 (2nd Sess.), c. 12, s. 92.

Bribes.

**93.** Every person who

(*a*) promises, offers or gives any bribe to any officer or any person acting in any office or employment connected with the collection, management or disbursement of public money, with intent

(i) to influence his decision or action on any question or matter that is then pending, or may, by law, be brought before him in his official capacity, or

(ii) to influence such officer or person to commit, or aid or abet in committing any fraud on the revenue, or to connive at, collude in, or allow or permit any opportunity for the commission of any such fraud, or

(*b*) accepts or receives any such bribe,

is guilty of an indictable offence, and is liable on conviction to a fine not exceeding three times the amount so offered or accepted, and to imprisonment for any term not exceeding five years. 1951 (2nd Sess.), c. 12, s. 93.

Books, etc., property of Her Majesty.

**94.** All books, papers, accounts and documents kept or used by, or received or taken into the possession of any person who is or has been employed in the collection or management of the revenue or in accounting for the revenue, by virtue of that employment, shall be deemed to be chattels belonging to Her Majesty; and all money or valuable securities received or taken into the possession of any such officer or person by virtue of his employment shall be deemed to be money and valuable securities belonging to Her Majesty. 1951 (2nd Sess.), c. 12, s. 94.

## PART X.

### MISCELLANEOUS.

Debts due to Crown.

**95.** (1) Where, in the opinion of the Minister of Justice, any person is indebted to Her Majesty in right of Canada in any specific sum of money, the Treasury Board may authorize the Minister of Finance to retain by way of deduction or set-off the amount of any such indebtedness out of any sum of money that may be due or payable by Her Majesty in right of Canada to such person.

Provincial taxes.

(2) Where, in the opinion of the Minister of Justice, any person is indebted in any specific sum of money on account of taxes payable to any province, and an agreement exists between Canada and the province whereby Canada is authorized to collect the tax on behalf of the province, the Treasury Board may authorize the Minister of Finance to retain by way of deduction or set-off, out of any sum of money that may be due or payable by Her Majesty in right of Canada to such

person, the amount of such indebtedness, but the amount so retained shall not exceed the amount that might under the laws of the province be seized or attached under execution or garnishee proceedings.

(3) Where, in the opinion of the Minister,

Payments in respect of which Canada has contributed.

(*a*) any person is indebted to a province in any specific sum of money by reason of his having received from the province a payment, in respect of which Canada has contributed under the provisions of any Act, to which he was not entitled, and

(*b*) the province has made reasonable efforts to effect recovery of the amount of such indebtedness,

the Treasury Board may authorize the Minister to retain by way of deduction or set-off the amount of such indebtedness out of any sum of money that may be due and payable by Her Majesty in right of Canada to such person, and the amount so deducted less the portion thereof that in the opinion of the Minister is proportionate to the contribution in respect thereof made by Canada, may be paid to the province out of the Consolidated Revenue Fund. 1951 (2nd Sess.), c. 12, s. 95.

Tabling of information already contained in Public Accounts.

**96.** Whenever it appears to the Governor in Council that any account, statement, return or document required by any Act of Parliament or otherwise to be laid before one or both Houses of Parliament contains the same information as or less information than is contained in the Public Accounts, the Governor in Council may direct that the account, statement, return or other document be discontinued, and thereafter it need not be prepared or laid before either House of Parliament. 1951 (2nd Sess.), c. 12, s. 96.

Transfers, etc., of property.

**97.** Subject to any other Act of Parliament, no transfer, lease or loan of property owned by Her Majesty in right of Canada shall be made to any person, except in accordance with regulations or on the direction of the Governor in Council. 1951 (2nd Sess.), c. 12, s. 97.

Public Officers Guarantee Account.

**98.** (1) There shall be established in the Consolidated Revenue Fund a special account to be known as the Public Officers Guarantee Account to which shall be transferred or credited, in accordance with the regulations,

(*a*) the balance of the Government Officers Guarantee Fund,

(*b*) amounts paid by departments by way of premiums, and

(*c*) amounts recovered by Her Majesty in respect of payments out of the said Account or the Government Officers Guarantee Fund,

and payment may be made out of the said Account, in accordance with the regulations, by way of indemnity for losses suffered by Her Majesty or others by reason of defalcations or other fraudulent acts or omissions of public officers.

Regulations.

(2) The Treasury Board may make regulations

(*a*) prescribing the conditions upon which payments may be made out of the Public Officers Guarantee Account,

(*b*) requiring departments to deposit amounts to the credit of the said Account, and

(*c*) governing the operation of the said Account by the Minister.

Reporting.

(3) Every payment out of the Public Officers Guarantee Account and the amount of every loss suffered by Her Majesty by reason of defalcations or other fraudulent acts or omissions of a public officer, together with a statement of the circumstances, shall be reported annually in the Public Accounts. 1951 (2nd Sess.), c. 12, s. 98.

No charge for certain cheques.

**99.** No bank shall make a charge for cashing a cheque or other instrument drawn on the Receiver General or on his account in the Bank of Canada or any other bank, or for cashing any other instrument issued as authority for the payment of money out of the Consolidated Revenue Fund, or in respect of any cheque or other instrument drawn in favour of the Receiver General, the Government of Canada or any department thereof or any public officer in his capacity as such, and tendered for deposit to the credit of the Receiver General. 1951 (2nd Sess.), c. 12, s. 99.

Regulations.

**100.** The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect. 1951 (2nd Sess.), c. 12, s. 100.

## SCHEDULE A

Department of Agriculture.
Department of Citizenship and Immigration.
Department of Defence Production.
Department of External Affairs.
Department of Finance.
Department of Fisheries.
Department of Insurance.
Department of Justice.
Department of Labour.
Department of Mines and Technical Surveys.
Department of National Defence.
Department of National Health and Welfare.
Department of National Revenue.
Department of Northern Affairs and National Resources.
Post Office Department.
Department of Public Works.
Department of Public Printing and Stationery.
Department of the Secretary of State of Canada.
Department of Trade and Commerce.
Department of Transport.
Department of Veterans Affairs.

## SCHEDULE B

Agricultural Prices Support Board.
Atomic Energy Control Board.
Canadian Maritime Commission.
Director of Soldier Settlement.
The Director, The Veterans' Land Act.
Dominion Coal Board.
Fisheries Prices Support Board.
National Gallery of Canada.
National Research Council.
Unemployment Insurance Commission.

## SCHEDULE C

Atomic Energy of Canada Limited.
Canadian Arsenals Limited.
Canadian Commercial Corporation.
Canadian Patents and Development Limited.
Crown Assets Disposal Corporation.
Defence Construction (1951) Limited.
Federal District Commission.
National Battlefields Commission.
National Harbours Board.
Northern Canada Power Commission.
Park Steamship Company Limited.

## SCHEDULE D

Canadian Broadcasting Corporation.
Canadian Farm Loan Board.
Canadian National (West Indies) Steamships, Limited.
Canadian Overseas Telecommunication Corporation.
Central Mortgage and Housing Corporation.
Eldorado Aviation Limited.
Eldorado Mining and Refining Limited.
Export Credits Insurance Corporation.
National Railways as defined in the *Canadian National-Canadian Pacific Act.*
Northern Ontario Pipe Line Crown Corporation.
Northern Transportation Company Limited.
Polymer Corporation Limited.
Trans-Canada Air Lines.
St. Lawrence Seaway Authority.

## SCHEDULE E

Enactments Repealed

| *Title* | *Citation* | *Extent of Repeal* |
|---|---|---|
| The Consolidated Revenue and Audit Act, 1931 | 1931, c. 27 | the whole |
| Department of Finance and Treasury Board Act | R.S. 1927, c. 71 | sections 1 to 13 |
| The Department of Transport Stores Act | 1937, c. 28 | the whole |
| Board of Audit Act | R.S. 1927, c. 10 | the whole |
| Contingencies Act | R.S. 1927, c. 31 | the whole |
| Debts due to the Crown Act | 1932, c. 18 | the whole |
| The Government Companies Operation Act | 1946, c. 24 | sections 3, 4, 5, 6 and 10 |

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# Table of Cases

# Table of Textbooks Cited